No. 02-1016

AUG 11 2003

IN THE

Supreme Court of the United States

LEE M. TILL AND AMY M. TILL,
Petitioners,

v.

SCS CREDIT CORPORATION,
Respondent.

On Writ of Certiorari
To The United States Court of Appeals
For The Seventh Circuit

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED JANUARY 2, 2003
CERTIORARI GRANTED JUNE 16, 2003

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The following opinions, orders, decisions, judgments, relevant statutes, orders, and amended chapter 13 plan have been omitted in printing this Joint Appendix because they appear on the following pages in the Appendix to the Petition for Writ of Certiorari:

1. Court of Appeals Order Denying Petition for Rehearing entered October 10, 2002 .....Pet. App. 1a
2. Court of Appeals Opinion entered August 21, 2002 .....Pet. App. 3a
3. District Court Order entered November 1, 2000 .....Pet. App. 34a
4. Bankruptcy Court Order Confirming Amended Plan entered June 27, 2000 .....Pet. App. 40a

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5. Relevant Statutes.....Pet. App. 44a
6. Amended Chapter 13 Plan filed June 27, 2000 .....Pet. App. 76a

UNITED STATES DISTRICT COURT
SEVENTH CIRCUIT COURT OF APPEALS

No. 00-4167

LEE M. TILL, *et al.*,
Petitioners,

v.

SCS CREDIT CORPORATION,
Respondent.

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
12/7/00	Bankruptcy case docketed. [00-4167] [1352405-1] Transcript information sheet due 12/18/00. Appellant's brief due 1/16/01 for Lee M. Till, for Amy M. Till (kell)
12/14/00	ORDER: Appellant Lee M. Till, Appellant Amy M. Till shall file a brief memorandum stating why this appeal should not be dismissed for lack of jurisdiction. [1352405-1] DW [00-4167] [1354786-1] Briefing is SUSPENDED pending further court order. (See order for further details) Jurisdictional memorandum due 1/2/01 for Amy M. Till, for Lee M. Till. (land)
12/27/00	Filed Appellants Lee M.Till and Amy M. Till jurisdictional memorandum. [00-4167] [1357491-1] (jame)
11/27/01	ORDER re: Jurisdictional memorandum filed by appellants and the response filed by the appellee. This appeal shall proceed to briefing. The brief

DATE	PROCEEDINGS
	ing schedule is as follows: [1357491-1] DW [00-4167] Appellants' joint brief due 1/2/02 for Lee M. Till, for Amy M. Till, Appellee's brief due 2/1/02 for SCS Credit Corp. Appellants' joint reply brief due 2/15/02 for Lee M. till, for Amy M. Till. Further, the clerk is directed to distribute, along with the briefs in this appeal, copies of this order, the court's order of December 14, 2000, the appellants' "JURISDICITONAL MEMORANDUM" filed on December 27, 2000, and appellee's response filed on January 16, 2001. (land)
4/10/02	Case heard and taken under advisement by panel: Circuit Judge Kenneth F. Ripple, Circuit Judge Daniel A. Manion, Circuit Judge Ilana D. Rovner. [00-4167] [1497192-1] (broo)
8/21/02	Filed opinion of the court by Judge Rippie. The judgment of the district court is VACATED and the case is REMANDED with instructions. The parties shall bear their own costs of this appeal. Circuit Judge Kenneth F. Ripple, Circuit Judge Daniel A. Manion, Circuit Judge Ilana D. Rovner, dissenting. [00-4167] [1352405-1] (land)
9/3/02	Filed 30c Petition for Rehearing and Petition for Rehearing Enbanc by Appellant Amy M. Till, Appellant Lee M. Till. Dist. [00-4167] [1542884-1] (hard)
10/10/02	ORDER: Appellant Amy M. till, Appellant Lee M. Till Petition for Rehearing and Petition for Rehearing Enbanc is DENIED. [00-4167] [1542884-1] (kell)

UNITED STATES DISTRICT COURT
SOUTHERN INDIANA

Court of Appeals Docket No. 00-4167

LEE M. TILL, *et al.*,
Petitioners,

v.

SCS CREDIT CORPORATION,
Respondent.

RELEVANT DOCKET ENTRIES

DATE	NO.	PROCEEDINGS
07/06/00	1	Bankruptcy N/A from BK Court Cause No. 99-13425-FJO-13, Record is nOT complete. eod 07/07/00 [DLD]
07/07/00	2	NOTICE to the parties that the appeal has been filed with the USDC. Cm CLERK eod 07/07/00 {DLD]
09/20/00	8	BRIEF cs APPELLANT'S BRIEF eod 09/21/00 {DLD]
10/02/00	9	BRIEF cs APPELLEES BRIEF eod 10/03/00 {DLD]
11/02/00	12	CLOSED Remanded to the United States Bankruptcy Court. (See Order) cm LJM eod 11/02/00 [DLD]
11/22/00	14	NOTICE OF APPEAL from District Court Order entered 11/01/00, remanding case to U.S. Bankruptcy Court. c/s Debtors/ Appellees (Lee & Amy Till). Eod 11/29/00 [GRN]

DATE	NO.	PROCEEDINGS
12/05/00	22	JOINT MOTION for Stay of Enforcement of District Court's Order Remanding Case . . . Pending Appeal c/s (Parties) eod 12/06/00 [GRN]
12/07/00	23	ORDER GRANTS MOTION of Parties for Stay of Enforcement of District Court's Order Remanding Case for further Consideration of Appropriate Interest Rate on Deferred Value Factor c/m LJM eod 12/07/00 [GRN]
10/21/02	27	MANDATE RECEIVED FROM CA. The judgment of the District Court is VACATED and the case is REMANDED to the District Court with instructions that the judgment of the Bankruptcy Court be vacated and that further proceedings consistent with this opinion be held in the bankruptcy court, all in accordance with the decision of the C/A entered 10/21/02. Received certified copy of opinion and judgment. Records returned consisting of 1 vol pleadings & 4 vols loose pleading. eod 10.21.02 [GRN]
12/02/02	28	CLOSED Remanded to U.S. Bankruptcy Court for the Southern District of Indiana for further proceedings consistent with the opinion of the Seventh Circuit Court of Appeals. Acting pursuant to direction from the Seventh Circuit Court of Appeals, this Court now orders that the judgment of the Bankruptcy Court is VACATED cm LJM eod 12/04/02 {DLD]

UNITED STATES BANKRUPTCY COURT
SOUTHERN INDIANA

Docket No. 00-4167

LEE M. TILL, *et al.*,
Petitioners,

v.

SCS CREDIT CORPORATION,
Respondent.

RELEVANT DOCKET ENTRIES

DATE	NO.	PROCEEDINGS
10/25/1999	5	CHAPTER 13 PLAN FILED [Entered: 10/27/1999] [XX]
11/24/1999	16	OBJECTION TO THE CONFIRMATION OF THE PLAN, FILED BY SCS CREDIT CORP. [Re: #35] [Entered: 11/24/1999 [XX]
12/02/1999	17	RESPONSE FILED BY DEBTORS TO OBJECTION TO CONFIRMATION BY SCS CREDIT CORP [Re: #16] [Entered: 12/03/1999][HH]
01/19/2000	22	CHAPTER 13 PLAN FILED (AMENDED) [Re: #5] [Entered: 01/20/2000] [HH]
01/31/2000	29	OBJECTION TO THE PLAN, FILED BY SCS CREDIT CORP. [Re: #22] [Entered: 02/01/2000 [XX]

DATE	NO.	PROCEEDINGS
02/07/2000	31	BRIEF (SUPPLEMENTAL) IN RE SPONSE TO SCS CREDIT CORP'S OBJECTION TO CONFIRMATION, FILED BY THE DEBTORS. [Re: #29] [Entered: 02/08/2000] [XX]
02/29/2000	33	PRO MEMO RE: CONTINUED HEARINGS ON (1) TRUSTE'S MOTION TO DISMISS; (2) OBJECTION TO CONFIRMATION FILED BY SCS CREDIT CAN DEBTORS' RESPONSE FILED THERETO. DISPOSITION: (1) WITHDRAWN. (2) BRIEF DUE W/IN 10 DAYS FROM SCS CREDIT CORP. COURT TO RULE. [Re: #31] [Entered: 02/29/2000 [XX]
03/08/2000	35	MEMORANDUM IN SUPPORT OF OBJECTION TO CONFIRMATION FILED BY SCS CREDIT CORP. [Re: #29] [Entered: 03/09/2000] [MJ]
03/29/2000	36	RESPONSE OF DEBTORS TO SCS CREDIT CORPORATION MEMORANDUM IN SUPPORT OF OBJECTION TO CONFIRMATION OF PLAN [Re: #35] [Entered: 03/30/2000] [LY]
04/17/2000	37	TRUSTEE FILED COMMENTS REGARDING THE INTEREST RATE AND AUTOMOBILE LENDER IS ENTITLED TO RECEIVE IN CHAPTER 13 PROCEEDINGS. [Entered: 04/18/2000] [XX]
06/27/2000	40	ORDER CONFIRMING CHAPTER 13 PLAN (AMENDED PLAN) [Re: #22] [Copies: 1] [Entered: 06/28/2000] [LY]

DATE	NO.	PROCEEDINGS
06/06/2000	41	NOTICE OF APPEAL FILED BY SCS CREDIT CORP. [Re: #40] [Entered: 07/06/2000 [MJ]
07/06/2000	43	TRANSMITTAL OF NOTICE OF APPEAL AND RELATED DOCUMENTS TO DISTRICT COURT; CASE ASSIGNED TO DISTRICT COURT JUDGE MCKINNEY AND MAGISTRATE SHIELDS; (CASE NO. 00-1102C) [Re: 341] [Copies: 3] [Entered: 07-02-2000]
11/02/2000	57	ORDER OF UNITED STATES DISTRICT COURT JUDGE LARRY J MCKINNEY REVERSING BANKRUPTCY COURT JUDGE'S ORDER CONFIRMING THE CHAPTER 13 PLAN [Re: 340] [Entered: 11/03/2000] [XX]
11/28/2000	60	STIPULATION ON STAY OF ENFORCEMENT OF DISTRICT COURT'S ORDER REMANDING CASE FOR FURTHER CONSIDERATION OF APPROPRIATE INTEREST RATE ON DEFERRED VALUE FACTOR FILED BY DEBTOR AND SCS CREDIT CORPORATION [Re: #57] [Entered: 11/28/2000] [MJ]
11/15/2002	77	STIPULATION ON ENTRY OF DISCHARGE WITH BANKRUPTCY CASE TO REMAIN OPEN PENDING THE DECISION OF THE UNITED STATES SUPREME COURT IF THE COURT ACCEPTS TRANSFER UNDER A WRIT OF CERTIORARI AND HEARS THIS

DATE	NO.	PROCEEDINGS
		MATTER FILED BY DEBTORS AND CREDITOR SCS CREDIT CORP. [Entered: 11/15/2002] [WU]
11/27/2002	78	ORDER ON PARTIES STIPULATION ON ENTRY OF DISCHARGE WITH THE BANKRUPTCY CASE TO REMAIN OPEN PENDING THE DECISION OF THE U.S. SUPREME COURT IF THE COURT ACCEPTS TRANSFER UNDER A WRIT OF CERTIORARI AND HEARS THIS MATTER [Re: 377] [Copies: 1] [Entered: 11/27/2002] [PA]
02/21/2003	86	DISCHARGE OF DEBTOR & CERTIFICATE OF SERVICE [Copies: 47] [Entered: 02/24/2003 1:01 AM] [Auto]

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

[Filed 1999 Oct 25 PM 4:03]

CASE NO 99-13425
FJ013

IN RE: Lee Madison Till
312-78-7180

Amy Helen Till
313-98-1051
Debtor(s)

CHAPTER 13 PLAN

TO THE HONORABLE UNITED STATES BANKRUPTCY JUDGE OF SAID COURT:

COME NOW. Lee Madison Till and Amy Helen Till, Debtors herein, and propose the following plan under Chapter 13 of the Bankruptcy Code:

1. The debts of DEBTOR(S) duly proved and allowed shall be paid to the holder thereof in accordance with the provisions of Chapter 13 of the Bankruptcy Code and this Plan.

2. The future earnings of Debtor(s) are submitted to the supervision and control of this Court, and Debtor(s) shall pay to the Trustee a sum of $1,089.00 per month by

voluntary weekly wage assignment from Debtor's pay beginning within 30 days of the filing date of this case and thereafter for a full term (duration) of this plan. This plan shall be for 36 months.

3. From the payments received, the TRUSTEE will make disbursements in the following order:

(a). Administrative Expenses: The TRUSTEE shall FIRST pay the expenses as prescribed by the Court, for administering of this plan.

Name of Creditor	Type	Amount	Interest Rate	Monthly Payment	Term	Total Paid
Trustee	normal expenses					

(b). Priority Claims: All Claims entitled to priority under Section 507 of the Bankruptcy Code will be paid as follows:

Name of Creditor	Claim Amount	Amount Entitled To Priority	Interest Rate	Monthly Payment	Term	Total Paid
Internal Revenue Service	$2,582.00	$2,582.00	0%	Pro-Rate	1-17	$2,582.00

(c). Secured Claims: Secured creditors, whose claims are duly and timely filed, approved and allowed will be treated as follows:

(1). Valuation of Collateral: The Creditors listed below have a claim secured by a lien on the collateral shown and the claim of each such creditor is secured to the extent of the fair market value of such property. The value of such creditor's interest in such collateral is as set forth hereinbelow and such fair market value set hereinbelow is binding as to each such creditor. Pursuant to the Bankruptcy Code, the Debtor(s) ask the Court to value the

collateral shown as indicated below and to determine what portion, if any, of the following claim or claims are secured and what portions are unsecured. The purpose of this plan provision and valuation is to clearly provide that once Debtor(s) have paid such fair market value through the TRUSTEE, the lien of each such secured creditor shall be deemed invalid and, at such time, each creditor shall immediately execute and deliver any and all necessary documents to effectuate release of such lien and delivery of an unencumbered title to the Debtor(s).

Name of Creditor	Collateral Description	Fair Market Value
Ace Financial	1996 Dodge Stratus	$8,500.00
Heilig-Meyers Furniture Co.	kitchen table	$50.00
Radio Shack Credit Card Plan	scanner & speakers	$75.00
SCS Credit Corporation	1991 S-10 Truck	$4,225.00

* *Variable payments are scheduled, please see Pro Forma, if attached.*

Computer software provided by LegalPRO Systems, Inc., San Antonio, Texas (210) 820-3001.

Each secured creditor described herein shall retain the lien existing prior to the commencement of the case only to the extent of the value of the collateral and to secure payment of the allowed amount of its claim. In the case of each secured creditor listed in this section, the allowed amount is the fair market value set forth herein. Once the allowed secured amount has been satisfied through the Plan, the creditors lien will have been satisfied in full and the lien will no longer exist. Upon payment of the secured portion of a creditor's claim, the creditor shall immediately release its lien and deliver clear title to the Debtor(s).

(2). Payment of Secured Claims: Secured creditors, whose claims are duly and timely filed, approved and allowed, will be paid as follows:

Name of Creditor	Amt. Claimed Value of Collat.	Principal Amt to Be Paid	Interest Rate	Monthly Payment	Term	Total Paid
Ace Financial	$11,000.00 Value:$8,500.00	$8,500.00	9.5%	Pro-Rata	1-17	$9,089.31
Heilig-Meyers Furniture Co.	$525.00 Value: $50.00	$50.00	0%	Pro-Rata	1-17	$50.00
Radio Shack Credit Card Plan	$750.00 Value: $75.00	$75.00	0%	Pro-Rata	1-17	$75.00
SCS Credit Corporation	$4,500.00 Value: $4,225.00	$4,225.00	9.5%	Pro-Rata	1-17	$4,517.89

(3). Void Lien: The secured creditors listed below hold a non-purchase money, non-possessory security interest on Debtor(s) exempt property. Their lien will be voided pursuant to 11 U.S.C. § 522(f) and their claim treated as unsecured and paid pursuant to paragraph (c) below:

Name of Creditor	Collateral Description	Amount of Claim
Heilig-Meyers Furniture Co.	HHS	$1,300.00

(d). Special Class: The following specially classified claims shall be paid as follows: None

Name of Creditor	Claim Amount	Principal Amt. To Be Paid	Interest Rate	Monthly Payment	Term	Total Paid

(e). Unsecured Claims: Unsecured claims will be paid by the TRUSTEE after payment of the aforementioned categories, to creditors who have duly and timely filed and proved their claim, with the same having been allowed by the Court, with such

payments or dividends to be paid in lieu of the debt and in satisfaction of the debts of such creditors.

(f). No interest, penalty or additional charge shall be allowed on any account subsequent to the filing of the petition herein, except that interest shall be allowed on claims to fully secured creditors in accordance with the 11 U.S.C. § 506(b).

4. DEBTOR(S) shall pay direct the following debts outside the Plan: None

Name of Creditor	Collateral Description	Monthly Amount	Balance

5. The following secured claims are not dealt with in the DEBTOR'S plan, therefore, upon confirmation of the DEBTOR(S)' Chapter 13 Plan, the automatic stay provisions of 11 U.S.C. § 362 will be terminated and annulled with respect to each of the following claims: None

Name of Creditor	Collateral Description	Claim	Value	Deficiency

The automatic stay provisions of 11 U.S.C. Sec. 362 remain in effect as to DEBTOR(S).

The remaining portion of the debt (deficiency), if any, shall be treated as any other general unsecured claim under this plan.

6. All executory contracts of the DEBTOR(S) will be assumed unless specifically rejected herein. The following executory contracts and/or leases are ASSUMED or REJECTED as indicated below:

Name of Creditor	Contract is Assumed/Rejected
Bradford Run Apartments	Rejected
DMA Enterprise	Assumed
Maple Crest Apartments	Rejected

• *Variable payments are scheduled, please see Pro Forma, if attached.*

Computer software provided by LegalPRO Systems, Inc., San Antonio, Texas (210) 820-3001.

7. Upon confirmation of this plan, title of the property of the estate shall vest in DEBTOR(S).

8. The Court may, from time to time, during the period of the plan, extend, increase or reduce the amount of any of the installments provided for by the plan, or extend or shorten the time for any such payments where it shall be made to appear, after such hearing, upon such notice as the Court may designate, that the circumstances of DEBTOR(S) so warrant or so require; provided, however, that nothing in this plan shall be construed to prevent the granting of a discharge of DEBTOR(S) as provided in 11 U.S.C. § 1328.

Additional Provisions of the Plan

Tax Refund

Debtors shall remit one half (1/2) of their Federal Tax refund over the cushion amount of $500.00 for the 1999, 2000, and 2001 tax years.

DATED on this the 21 day of October, 1999.

/s/ Lee Madison Till
DEBTOR: LEE MADISON TILL

/s/ Amy H. Till
Debtor: AMY HELEN TILL

UAW-Daimler Chrysler Legal Services Plan

/s/ Edward M. Kohan
Edward M. Kohan
Bar Number: 20967-49
217 Southway Blvd. East
Suite 106
Kokomo, Indiana 46902
Phone (765) 864-6400
Fax: (765) 864-6424

PROOF OF CLAIM

[Filed 1999 Nov 15]

UNITED STATES BANKRUPTCY COURT:
SOUTHERN DISTRICT OF INDIANA

Name of Debtor: Lee and Amy Till

Case Number: 99-13425

NOTE: This form should not be used to make a claim for an administrative expense arising after the commencement of the case. A "request" for payment of an administrative expense may be filed pursuant to 11 U.S.C. § 503.

Name of Creditor (The person or other entity to whom the debtor owes money or property): *SCS Credit Corp*

□ Check box if you are aware that anyone else has filed a proof of claim relating to your claim. Attach copy of statement giving particulars.

□ Check box if you have never received any notices from the bankruptcy court in this case.

□ Check box if the address differs from the address on the envelope sent to you by the court.

Name of address where notices should be sent: SCS Credit Corp., 620 S. Ironwood Dr., Mishawaka, IN 46544, Telephone number: 800-455-3371

Account or other number by which creditor identifies debtor: 32518

□ Check here if this claim □ replaces □ amends a previously filed claim dated: _____

1. Basis for Claim

■ Goods sold

□ Services performed

□ Money loaned

□ Personal injury/wrongful death

□ Taxes

□ Other _____

□ Retiree benefits as defined in 11 U.S.C. § 1114(a)

□ Wages, salaries, and compensation (fill out below)

Your SS #:____ ____ ____

Unpaid compensation for services performed from (date)_____ to (date)_____

2. Date debt was incurred: 10-02-98

3. If court judgment, date obtained:

4. Total Amount of Claim at Time Case Filed: *$4,894.89*

If all or part of your claim is secured or entitled to priority, also complete Item 5 or 6 below

□ Check this box if claim includes interest or other charges in addition to the principal amount of the claim. Attach itemized statement of all interest or additional charges.

5. Secured Claim.

■ Check this box if your claim is secured by collateral (including a right of setoff).

Brief Description of Collateral:

□ Real Estate

□ Motor Vehicle

□ Other

Value of Collateral: *$4,000.00*

Amount of arrearage and other charges at time case filed included in secured claim, if any: *$994.03*

6. Unsecured Priority Claim.

□ Check this box if you have an unsecured priority claim

Amount entitled to priority $____

Specify the priority of the claim:

□ Wages, salaries, or commissions (up to $4,300) * earned within 90 days before filing of the bankruptcy petition of the debtor's business, whichever is earlier—11 U.S.C. § 507(a)(3).

□ Contributions to an employee benefit plan—11 U.S.C. § 507(a)(4).

□ Up to $1,950* of deposits toward purchase, lease, or rental of property or services for personal, family, or household use—11 U.S.C. § 507(a)(6).

□ Alimony, maintenance, or support owed to a spouse, former spouse, or child—11 U.S.C. § 507(a)(7)

□ Taxes or penalties owed to governmental units—11 U.S.C. § 507(a)(8).

□ Other—Specify applicable paragraph of 11 U.S.C. § 507(a)(__).

* Amounts are subject to adjustment on 4/1/98 and every three years thereafter with respect to cases commenced on or after the date of adjustment.

7. Credits: The amount of all payments on this claim has been credited and deducted for the purpose of making this proof of claim.

8. Supporting Documents: Attach copies of supporting documents, such as promissory notes, purchase orders, invoices, itemized statements of running accounts, contracts, court judgments, mortgages, security agreements, and evidence of perfection of lien. DO NOT SEND ORIGINAL DOCUMENTS. If the documents are not available, explain. If the documents are voluminous, attach a summary.

9. Date-Stamped Copy: To receive an acknowledgment of the filing of your claim, enclose a stamped, self-addressed envelope and copy of this proof of claim.

Date: ____

Sign and print name and title, if any, of the creditor or other person authorized to file this claim (attach copy of power of attorney, if any):

/s/ Kimberly, Desits,
KIMBERLY, DESITS, Recovery Specialist

Penalty for presenting fraudulent claim: Fine of up to $500,000 or imprisonment for up to 5 years or both. 18 U.S.C. §§ 152 and 3571.

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

[Filed 1999 Nov. 24]

IN RE:	)
	) - CASE NO. 99-13425
LEE MADISON TILL	) CHAPTER 13
CASE NO. 994 3425	
AMY HELEN TILL	)
Debtor.	)

OBJECTION TO CONFIRMATION OF PLAN

COMES NOW SCS Credit Corp., hereinafter referred to as Secured Party, by counsel, and in support of its objection to confirmation of the debtor's plan states as follows:

1. On or about the 25th day of October, 1999, Debtor filed a Petition for Relief under Chapter 13 of the United States Bankruptcy Code.

2. The indebtedness was and now is secured by a lien on a vehicle pursuant to a Retail Installment Contract and Security Agreement entered into by and between Secured Party and the Debtor. A copy of said Retail Installment Contract and Security Agreement is attached hereto as Exhibit A.

3. Debtor has submitted a Plan to this Court indicating an intent to pay Secured Party interest on its secured claim in the amount of 9.5%. Secured Party objects to the proposed rate of interest because it does not comply with the requirements of 11 U.S.C. Sec. 1325(a) because Secured Party is entitled to the rate of interest it could have obtained had it foreclosed and reinvested the proceeds in loans of equivalent duration and risk as the loan made by Secured Party to the Debtor. Secured Party is entitled to interest at the rate of 21 %, which is the rate of interest it would obtain if it could foreclose on the vehicle and reinvest the proceeds in loans of equivalent

duration and risk as the loan made to the Debtor by Secured Party. Failure of the Debtor to comply with 11 U.S.C. Sec. 1325(a) gives Secured Party grounds to object to confirmation of the Plan submitted by the Debtor to this Court.

WHEREFORE, Secured Party requests that this Court not confirm the Plan submitted by the Debtor, and that a hearing be held to determine the appropriate rate of interest which Debtor must pay to Secured Party in a proposed Chapter 13 Plan, and any and all other appropriate relief.

/s/ John M Smith #14345-20
JOHN M SMITH
Attorney for Secured Party
214 W. Marion Street
Elkhart, IN 46516
(219) 295-4537

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above and foregoing motion was served on the 22 day of Nov., 1999 upon the following: Lee and Amy Till, 502 E. Spraker, Kokomo, IN 46901, Edward M. Kohan, 217 Southway Blvd. E., #106, Kokomo, IN 46902, Robert A. Brothers, 151 N. Delaware St., Suite 1940, Indianapolis, IN 46204-2526, U.S. Trustee, 101 W. Ohio St., #1000, Indianapolis, IN 46204.

/s/ John M. Smith
JOHN M. SMITH

765-453-6695

RETAIL INSTALLMENT CONTRACT AND SECURITY AGREEMENT

No 10173
Date 10/02/98

Buyer LEE TILL
AMY TILL
Address 706 MAUMEE DR
KOKOMO, IN 46902
"You" and "your" means each Buyer above and guarantor jointly and severally

Seller
Instant Auto Finance, Inc
Address 411 Flint Way
Kokomo IN 46901
"We" and "us" means the Seller above, its successors and assigns

SALE: You agree to purchase the property described below according to the following terms, including those on the reverse side.
You agree to pay us the principal sum of Six Thousand Four Hundred Twenty-Five and 75/100 dollars ($ 6,425.75 XX); plus interest from October 2, 1998 at:
Check one { (FIXED RATE) ☒ The rate of 21.00 % per year until paid in full
(VARIABLE RATE) ☐ The initial rate of N/A % per year, which rate is subject to change so as to always be N/A the following base rate N/A N/A
If "variable rate" is checked above, the interest rate in effect on this contract may change (as often as) N/A (assuming there is a change in the base rate) and an increase in the interest rate will cause an increase in N/A
You will pay the total amount due as follows (subject to change if marked "variable rate" above):
(a) XX In 62 installments of $ 117.43 each, beginning JAN 12, 19 99 and continuing on the same day of each 14 Day Period thereafter until paid in full.
(b) XX ☐ (other) 6 Payments of $167.43 Bi-Weekly Beginning OCT 20,1998
XX ☐ You agree to pay a late charge of 5% of the unpaid amount of an installment that is not paid within 10 days after it is due, up to a maximum of $ 10.00
PREPAYMENT: You may prepay this contract in full at any time.
XX ☐ You agree to pay a minimum finance charge of $ 0.00 if you pay this contract off before we have earned that much in interest.

SECURITY: You give us a purchase money security interest in the property described below, including all accessions, attachments, accessories, equipment and all proceeds from the property. **WARRANTY INFORMATION IS SUPPLIED TO YOU SEPARATELY.**

MAKE	YEAR	MODEL	BODY TYPE	LICENSE NO. YEAR	SERIAL NO
CHE	1990	S-10 EXT-	2DR	1GCCS19Z5L	2144196

Other Description

ANNUAL PERCENTAGE RATE The cost of your credit as a yearly rate	FINANCE CHARGE The dollar amount the credit will cost you.	AMOUNT FINANCED The amount of credit provided to you or on your behalf.	TOTAL OF PAYMENTS The amount you will have paid when you have made all scheduled payments.	TOTAL SALE PRICE The total cost of your purchase on credit, including your down payment of $ 300.00
21.00 %	$ 1,859.49	$ 6,425.75	$ 8,285.24	$ 8,585.24

	Number of Payments	Amount of Payments	When Payments Are Due
Your Payment Schedule will be:	6	$ 167.43	Bi-Weekly Beginning OCT 20,1998
	62	$ 117.43	Bi-Weekly Beginning JAN 12,1999
		$	

☐ **Variable Rate:** The annual percentage rate may increase during the term of this transaction if N/A
Any increase will take the form of N/A
If the rate increases by N/A % in one N/A the N/A will increase to N/A
The rate may not increase more often than once a N/A, and may not increase more than N/A % each N/A. The rate will not go above N/A %

Security: You are giving a security interest in the goods or property being purchased.
XX ☐ **Late Charge:** You will be charged 5% of the unpaid amount of an installment that is not paid within 10 days after it is due, up to a maximum of $ 10.00
Prepayment: If you pay off this contract early, you ☐ may XX ☐ will not have to pay a penalty.

You can see your contract documents for any additional information about nonpayment, default, any required repayment before the scheduled date, and prepayment refunds and penalties.
Filing fees $ N/A
e means an estimate

CREDIT INSURANCE

Credit life insurance and credit disability insurance are not required to obtain credit, and will not be provided unless you sign and agree to pay the additional costs.

Type	Premium	Term
Credit Life	0.00	0 Months
Credit Disability	0.00	0 Months
Joint Credit Life	0.00	0 Months

You ☐ do XX ☐ do not want credit life insurance
X
You ☐ do XX ☐ do not want credit disability insurance.
X
You ☐ do XX ☐ do not want joint credit life insurance
X
XX

PROPERTY INSURANCE

You may obtain property insurance from anyone that is acceptable to us. If you get the insurance from or through us you will pay
$ ____ for ____ of coverage.
The property insurance premium is calculated as follows:
☐ Fire-Theft and Combined Addl Coverage $ ____
☐ $ ____ Deductible Comprehensive Cov $ ____
☐ $ ____ Deductible Collision Coverage $ ____
☐ ____ $ ____

The above insurance does not include liability insurance coverage for bodily injury and property damage unless such insurance is specifically described above.

ITEMIZATION OF AMOUNT FINANCED

1. Cash Price (excluding Sales Tax)	$ ~~6,395.00~~
2. Down Payment Computation	
Description of Trade-in	
(a) Gross Trade-In Allowance	$ 0.00
(b) Pay-Off (if any)	$ 0.00
(c) Net Trade-In (a minus b)	$ 0.00
(d) Cash Down Payment	$ 300.00
(e) Total Down Payment (c plus d)	$ 300.00
3. Unpaid Balance of Cash Price (1 minus 2(e))	$ 6,095.00
4. Other Charges	
(a) To Insurance Companies	$ 0.00
(b) To Public Officials	$ 11.00
(c) Documentation Fee	$ 0.00
(d) Sales Tax	$ 319.75
5. Subtotal (3 plus 4(a) through 4(d))	$ 6,425.75
6. Prepaid Finance Charges XXXXXXXXXXXX	$ 0.00
7. Amount Financed (5 minus 6)	$ 6,425.75

NOTICE TO BUYER: (1) Do not sign this contract before you read it or if it contains any blank spaces. (2) You are entitled to an exact copy of the contract you sign. (3) Under the law you have the right, among others, to pay in advance the full amount due, and to obtain under certain conditions a partial refund of the finance charge. (4) This contract shall become effective only when signed and executed by the buyer and seller, and shall apply to and inure to the benefit of and bind the heirs, executors, administrators, successors and assigns of both parties to this contract.

BUYER ACKNOWLEDGES RECEIPT OF A COPY OF THIS RETAIL INSTALLMENT CONTRACT

1. Signed Lee Till Buyer
2. Signed Amy H Till Buyer

YOU ALSO AGREE TO THE TERMS ON THE REVERSE SIDE OF THIS CONTRACT.

Signed ____ For Seller
Title ____

ASSIGNMENT

Seller assigns this contract on 10/2 '98
to SCS CREDIT CORP.
____ in accordance with the Seller's Assignment appearing on the reverse side. The assignment is XX 1. ☐ Without Recourse 2. ☐ With Recourse 3. ☐ Subject to a Separate Agreement.
Instant Auto Finance, Inc. (Seller)
By Title

White First Copy - Original Canary Second Copy - Seller / Assignee's Copy Pink Third Copy - Buyer's Copy Goldenrod Fourth Copy - Seller's Copy

MOTOR VEHICLE

BEST AVAILABLE COPY

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

[Filed 2000 Jan. 31]

IN RE:	)	
	)	CASE NO. 99-13425
LEE MADISON TILL	)	CHAPTER 13
AMY HELEN TILL	)	
Debtor.	)	

OBJECTION TO CONFIRMATION OF PLAN

COMES NOW SCS Credit Corp., hereinafter referred to as Secured Parry, by counsel, and in support of its objection to confirmation of the debtor's plan states as follows:

1. On or about the 25th day of October, 1999, Debtor filed a Petition for Relief under Chapter 13 of the United States Bankruptcy Code.

2. The indebtedness was and now is secured by a lien on a vehicle pursuant to a Retail Installment Contract * and Security Agreement entered into by and between Secured Parry and the Debtor. A copy of said Retail Installment Contract and Security Agreement is attached hereto as Exhibit A.

3. Debtor's original Plan indicated an intent to pay Secured Party interest on its secured claim in the amount of 9.5% and Secured Party filed an Objection. On or about the 19th day of January, 2000, Debtor filed and Amended Plan which still provides for 9.5% interest and Secured Party continues to object to the proposed rate of interest.

* Duplicate copy of exhibit inserted at J.A. 21 omitted here in printing.

WHEREFORE, secured Party requests that this Court confirm the Plan submitted by the Debtor, and that a hearing be held to determine the appropriate rate of interest which Debtor must pay to Secured Party in a proposed Chapter 13 Plan, and any and all other appropriate relief.

/s/ John M. Smith
John M. Smith #14345-20
Attorney for Secured Party
214 W. Marion Street
Elkhart, IN 46516
(219) 295-4537

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above and foregoing motion was served on the 27 day of January, 2000 upon the following: Lee and Amy Till, 502 E. Spraker, Kokomo, IN 46901, Edward M. Kohan, 217 Southway Blvd. E., #106, Kokomo, IN 46902, Robert A. Brothers, 151 N. Delaware St., Suite 1940, Indianapolis, IN 46204-2526, U.S. Trustee, 101 W. Ohio St., #1000, Indianapolis, IN 46204.

/s/ John M. Smith
JOHN M. SMITH

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF INDIANA

Case #99-13425-13

Indianapolis, Indiana
February 29, 2000
9:43 a.m. O'clock

IN THE MATTER OF: LEE AND AMY TILL
Debtors

TRANSCRIPT OF CONTINUED HEARINGS ON: (1) TRUSTEE'S MOTION TO DISMISS; (2) OBJECTION TO CONFIRMATION FILED BY SCS CREDIT CORP., AND DEBTOR'S RESPONSE FILED THERETO BEFORE THE HONORABLE FRANK J. OTTE, J.U.S.B.C.

APPEARANCES:

For the Debtors:	EDWARD KOHAN, ESQ. 217 Southway Boulevard Kokomo, IN 46502
For SCS Credit Corp.:	JOHN SMITH, ESQ. 214 W. Marion Street Elkhart, IN 46516
For the Chapter 13 Trustee:	ROBERT BROTHERS, ESQ. Office of Robert A. Brothers, Chapter 13 Trustee 151 N. Delaware Street, Suite 1400 Indianapolis, IN 46204
Electronic Sound Recording Operator:	Cathy Ford

Proceedings Recorded by Electronic Sound Recording
Transcript Produced by Certified Transcription Service

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[3] (On the record at Tape #1, Index # 0060, 9:43 a.m.)

THE COURT: Till. We have Amy Till. This is a Chapter 13. My appearances are Ed Kohan for the debtors, and we have Bob Brothers, our Chapter 13 Trustee, and we have John Smith for the SCS Credit Corporation. The cause number in this case is 99-14325. Good morning, everybody.

ATTORNEYS: Good morning, Your Honor.

THE COURT: Mr. Brothers, first of all—first off, we have your motion to dismiss and the response. Now we're going to get involved in a very important legal issue here, but before we get involved in it, let's see where we're headed. Have you got a case that's going to be dismissed on us, or are we going to have a case that is viable?

MR. BROTHERS: No, Judge, I don't think so. At this time we would move to withdraw our motion as to the non-payment feature.

THE COURT: All right, sir.

MR. BROTHERS: We're getting adequately paid. That almost transforms our remaining two points in our motion, the best effort test issue, into almost an objection as opposed to the motion to dismiss. There are—Mrs. Till has a new job that's not previously been reflected in the paperwork filed, and also there is a large payment going to Rent-A-Center at 346 a month. We think at the tail end of the plan, probably at least the last year, that money should be available for [4] funding, and we'd ask that it be ordered paid over to us in full.

THE COURT: Rent-A-Center. What are we—what does that represent?

MR. KOHAN: Your Honor, that's the leasing of furniture. The debtors are leasing all of their furniture, I understand, and that represents the payment to Rent-A-Center.

THE COURT: Oh, my goodness. That's not a good deal in any sense of the word. You don't have some folks that can loan you some furniture?

MR. TILL: No, sir.

MRS. TILL: No, sir.

THE COURT: All right, well, what—what is it, Mr. Brothers, that you are requesting be done here then from the standpoint of the other creditors of that, at the end of the lease arrangement with Rent-A-Center—

MR. BROTHERS: That we be paid the 346 monthly for the final year of the plan. And in addition to that, at the present time, since Mrs. Till's income has never been treated in this filing, I think the best effort test needs to be met. Her income has to be considered. It hasn't been to date.

THE COURT: Okay. Okay.

MR. BROTHERS: And it is a new job, apparently.

THE COURT: Yes, sir.

MR. KOHAN: Your Honor, at the 341 hearing Mrs. Till [5] planned on being hired as prison guard in the new prison that's being built up north. It did not pan out. We informed the Trustee that in a couple of months we looked to see if she was working. She's not currently working. She was never—I don't know—did you not make it through the boot camp?

MRS. TILL: I did not make it through the training, no.

MR. KOHAN: She didn't make it—it's very, very rigorous training. She didn't make it through, so she's not working as a prison guard. She's not currently employed.

THE COURT: And you've got two young children at home.

MRS. TILL: Yes, I do.

THE COURT: All right.

MR. BROTHERS: The only issue left then, we'd like the 346 a month for twelve months—the last twelve months of the plan life, and we go away.

MR. KOHAN: We'll agree to file the new I and J once that payment goes away. I'll be more than willing today to give you the 346, but I would like to file an entire I and J just to see where they stand. I don't know where they're going to be in two years from now.

THE COURT: That makes sense, counsel.

MR. BROTHERS: The only problem is if we'll ever see any of the 346. It's like of like a game that gets played with [6] us. There's always a way to modify the budget to say, "Our 346 vanished. We paid it for two years, but we don't have it for the last year."

THE COURT: Well—

MR. BROTHERS: We never get the money, Judge, when they want to amend their I and J. We never see a penny of it. And it's now available, and it will be available for the next two years—

THE COURT: Well, the—

MR. BROTHERS: —and there's no reason it wouldn't be available for year three.

THE COURT: But as a practical matter, the flip side of it is is that that 341 represents the furniture they have now and at the end of these two years the furniture goes back, they're going to need—they're going to need something to replace that furniture, too.

MR. BROTHERS: I presume they're purchasing it.

THE COURT: Well, I think Rent-A-Center sounds like they're renting it.

MR. TILL: It's a rent with option to buy.

THE COURT: I see.

MR. TILL: At the end of the contract we would—

THE COURT: Well, if we were dealing with certainty we probably wouldn't have to be here to begin with, but we're not dealing with certainly, and we're dealing with people who [7] are having difficulty and attempting to work it out in a way that's fair and balanced for everybody.

Let's take a look at it after two years and see where they stand.

MR. BROTHERS: Yes, Your Honor.

THE COURT: I understand what you're saying, Mr. Brothers. That's the reality of a lot of promises we get here, but we'll take a look at it afresh and see where we stand.

MR. BROTHERS: Okay, thank you, Judge.

MR. KOHAN: Thank you, Judge.

THE COURT: All right. Now one final note on that before we continue here. These debtors will be furnishing the Trustee copies of their 1040s throughout the life of the plan. I'm certain of that, correct, Mr. Brothers?

MR. BROTHERS: It's not part of the plan offered, but we'd—we'll be willing to do that.

THE COURT: I would like to make that a part of the plan. And before we launch into the problem that we're all here for today—and that is the—what will be the interest rate that will be paid to SCS, I do note that this is one case with similar cases following, and I see counsel in the back here—Theresa Dearing and Dave Walton—have similar cases of this type, and I don't know what I'm going to do yet on this. I'm going to hear from everybody on it, but what I would like to do is to set their cases aside until we can finally get [8] this decided and get it clarified, and if they want to stay here they can, but they're free to leave if you want to also. I'm going to try to get some order to this so everybody knows where we are on this, and the debtors and the creditors don't have to keep coming in and battling this issue. So you're, of course, free to stay.

Now we have—Mr. Brothers, I want to hear from you on this issue, sir. You're aware of it. Tell me, what's the Trustee's position?

MR. BROTHERS: Well, the Trustee's position over the twenty-one years I've served in this capacity has been kind of one of, I guess, marked simplicity. At the beginning of my trusteeship in the late Seventies, after the Act was codified, I got together with some of the car lender creditors and some of the more prominent filers for debtors, and we discussed what seemed to be a fair percentage. We all agreed at that time that ten per cent was acceptable to both the debtor and the creditor community, at least as far as that microcosm of

people went, and that's kind of what we've tracked all—lo' these many years, Judge. Occasionally a debtor will drop below that to a, say, 8 per cent on an offer, but by and large that's been kind of a standard feature. I know that that approach would, from an appellate standpoint, would cut absolutely zero mustard in terms of—because it isn't a system. It was a number simply pulled out of the air.

[9] In terms of what's out there now and the approaches being used in the appellate court system, I'm impressed mostly by the—what appears to be a standard that possibly a majority of the courts are adopting, and that's the prime-plus standard that Judge Bayt used in his *Carson*, decision—decision back in 1998, and I think Judge Metz subsequently followed it, and that's simply computing the prime interest rate as of petition date—not as of confirmation date, but a nice, easy, out-front date, easy for all to compute—date of petition. When you're ready to file it you compute the prime and then add what historically these cases are treating as a one to three per cent additional risk factor in order to give the creditors some buffer against possible loss.

In this case, in *Carson* Judge Bayt pegged it at prime plus one and a half and adopted that as his future standard for all automobile interest rates that would come before him, and I think Judge Metz has followed that. That has added simplicity in our ability to run our office, and it's something that is readily computable and I think works quite effectively.

The courts have noted that you don't really have to reward the creditor with a higher interest rate over and above what it would have to pay to borrow money, and I know the creditor before the Court today is seeking what I perceive to be kind of its standard lending rate or market rate of 21 per cent, but this is just one creditor with this rate. Many of [10] our other lenders are substantially lower, so there appears to be little certainty when a debtor or debtor's counsel would attempt to prepare a petition as to what one would have to offer. Do you

have to come up with a 21 per cent for this creditor, or can you go down the road—?

For instance, the other day I noticed Hubler Dodge, down at 3800 South East Street or South Madison, their market rate was absolutely zero finance charge, and they were doing that as part of a promotion, but that was their rate. So their—in essence, with them you can walk into their dealership, compute the price of a brand new vehicle, divide it by 36 or 48 or 60 months, and that's your payment.

Without a standard other than market rate—or with the market rate standard that I think the creditor seeks and I'd ask this Court to adopt, you're always going to be playing with something slipping and sliding around that the average counsel wouldn't be able to compute it. The prime plus is easily ascertainable on a daily basis, and it wouldn't work in a way to engage this Court in sort of a, what I think is a frustrating search for what might be non-existent markets or non-existent similar loans that you would be dealing with.

The parties all look to the *Koopman's* case, Judge—it's the Seventh Circuit Chapter 12 case that came down some time ago to treat the interest factor that would be allowable. I really, probably for the first time—I'd read *Koopman's* [11] before but never gave it a hard read. I did it this morning, and I'm—it's kind of amazing when you go through the ruling. They adopt the prime plus standard, yet within the same sentence state that the lender is entitled to its market rate of interest. You can't have it both ways. You simply can't. I think there must have been some confusion at that level.

At the close-out of *Koopman's*, though, I think one of the final lines that the Court, the Seventh Circuit level, said,

> "You simply have to read the cost of capital from newspaper tables, based upon actual transactions in competitive markets."

Well, I did that today. I pulled the newspaper and I looked at it, and the table I saw is prime. It's the only thing I could go

by other than T-bill rates, which are lower, and I think probably no one has. Prime, as of today, for instance, is 8.75 per cent interest.

Now if you track the—if you track the Judge Bayt decision in *Carson* you'd add one and a half points to that and you'd have a ten and a quarter loan, easily computable when you sit down and meet with the debtor and put together a plan and yet gives the creditors some hedge factor on its risk. I think it's a good idea, and I think it's an appropriate standard to adopt.

The auto lender further has other built-in [12] protections available to it. It can come to the meeting, file a motion for relief from stay if it isn't adequately being protected in terms of being paid at a reasonable rate per month, or if it is not giving us lien retention which the Code mandates it can get relief that way. If the insurance is not in place, it can get relief that way. It also has the ability to scrutinize the I and the J the debtor files, in terms of whether this is a feasible offer. It could perfect its interest in that regard. It can come in and demand a wage assignment if it sees a debtor with a regular job.

I want a buffer against loss. I don't want this plan to belly up and I sit here—six, eight, nine months go by—I get a trickle of payments and the plan fails. Get a wage—it can argue for a wage assignment being in place and therefore work to protect its interest in that regard.

So the creditor has early-on tools available to it in terms of being able to come to a meeting and get quick relief if the offer is inappropriate. But I would urge the Court to adopt the prime-plus standard across the board as far as all the loans in this division are concerned.

THE COURT: Thank you, sir.

MR. BROTHERS: Sure.

THE COURT: Now, Mr. Smith, I want to hear from you. This is your motion. This is a motion that was filed in objection to the confirmation of the plan because the plan [13] offers a five point—or a 9.5 per cent—per cent rate. Yes, sir.

MR. SMITH: Thank you, Your Honor. I would agree with the Trustee that the *Koopman's*, case is the central case controlling this issue. I would disagree respectfully with his interpretation of that decision.

The *Koopman's*, case is a little bit confusing because it's not a very long opinion. They have a short holding in there, and then they talk about the cost of funds theoretically, how, in the open market, that it'll all—you know, you can look—there are several ways you can go about figuring out the market rate of interest, but one thing the case was clear about was that you should look to how the real market terms the rate of interest, and I think there is specific language in that case that says that you should not look to the speculation of Judges, Trustees, or lawyers with respect to what the rate of interest is for a particular market.

Now in the *Koopman's*, case, that particular—the Bankruptcy Court Judge, Judge Dees, found that prime-plus was the appropriate market rate of interest for that particular loan. Expert witnesses came in and testified—this was a real estate loan. Real estate loans are usually made on the basis of a prime rate, then adding some sort of risk factor if the—if the debtors are not prime—prime candidates or [14] prime customers. But in this particular case for this particular market, that is not how the market rate of interest is determined.

This is a sub-market of the auto-lending market, and in this sub-market it is commonly referred to as non-prime or sub-prime lending, and the market rate of interest for that particular market for these type of debtors with their credit history and credit record, is 21 per cent interest, which is the

maximum rate of interest which is currently allowed under Indiana law. I can almost quote verbatim the holding in the *Koopman's* case. It says,

> "We now hold that the creditor is entitled to the rate of interest that it could obtain if it were to foreclose on the collateral and it were to reinvest the proceeds in equivalent loans of duration and risk."

By that language I think it's pretty obvious that the emphasis is on the rate of interest that the particular creditor can obtain in its market, and I just feel that that's quite clear.

I can understand the Trustee's wanting to establish some type of certainty and have an easy mechanism for computing the interest rate, but that certainly can't be done at the expense of a particular creditor if a creditor is entitled to a higher rate. I think that we can have quite a bit of certainty by adopting this standard, and this standard was actually [15] adopted, I believe by the Fifth Circuit and possibly by the Third Circuit, and what those Courts said was that you look at the current rate of—or what you do is you start with a rebuttable presumption that the rate of interest charged to that particular debtor is the current market rate of interest for that creditor. There then arises a rebuttable presumption to that effect, but the debtor can come forward, and if the debtor can present evidence that that particular creditor is now receiving either less or more—obviously the debtor is not going to argue in favor of a higher interest rate—but either side, the creditor could come in and say, "Hey, when we loaned this money out a year and a half ago, our current rate of interest for this type of loan was 15 per cent. The current rate of interest for this type of loan now is 19 per cent." Vice-versa, the debtor could come in and say, "Current rate of interest was X, it's now lower." But I think that particular method of starting with the contract rate—which is, after all, the rate of

interest that the debtors agreed to pay, usually quite recently, and that is the rate of interest that the debtors were able to obtain in the open market.

I think common sense tell us that if the debtors were able to get an eight per cent or a ten per cent loan, a prime plus one or a prime plus two loan, they wouldn't have come to this particular creditor and voluntarily paid 21 per cent interest. So I just believe that there is an efficient way to [16] carry out the holding of the *Koopman's* case and to have some certainty for debtors and creditors, and that's basically my client's position, Your Honor.

THE COURT: All right, sir. Well said. Mr. Kohan.

MR. KORAN: We agree with the Trustee's analysis of the situation, but we would also like to add, we kind of have to see what's going on here, and what SCS is trying to do effectively is get around the cramdown, and they want twenty-one per cent, they want the contract rate.

I think we have to take a look at the Code in the whole. I mean, not only 1325 which says the creditor should get the present value of their claim. I believe we've agreed that your claim is $4,225. That's the present value of their claim.

We also need to take a look at 1322. We can modify a secured creditor's rights. The only secured creditor whose rights we can't modify are those loans that are secured by real estate in the debtor's principal residence. Well, this isn't that situation. This loan is secured by a car. That's it. We can modify their rights. In *Koopman's*, they say that we should look to the market rate of interest. We are. We're looking for the market rate of interest of auto loans.

I think where I disagree with Mr. Smith is that he's looking to his sub-market of high-interest, non-prime lenders. I would argue that the creditor's characteristics are [17] irrelevant. You look to the debtor's characteristics. We're adding one

and a half per cent for risk. These creditors in the bankruptcy, they have a wage assignment to the Trustee that is working. Their plan will not be confirmed unless the Court proves that it can make all the payments in the plan, and I think they have proven this. They're paying the Trustee.

I also think you have to look at the creditors are going to lose eventually. I mean, we cannot—they're only getting—they're not getting the entire claim. We're cramming it down. I think that also allows us to cram down the interest rate to nine and a half per cent. This compensates the creditor for the present value.

I would think, and I would argue that if the debtors could come up with that $4,225 at once, we wouldn't give them any interest rate. That's their claim, but they're not. They're deferring the payments over a period of three years. Since they are deferring the payments, we have to compensate the creditor for that. We have to give them something that allows for the changing value of the dollar. I've read in a couple of the cases that the whole concept of present value and adding a discount rate kind of revolves around the proposition that a dollar today is worth more than a dollar tomorrow, a dollar a month from now, and a dollar a year from now.

THE COURT: Which automobile is SCS on?

MR. TILL: The S-10.

[18] MR. KORAN. The S-10.

THE COURT: The S-10.

MR. KORAN: Yes.

THE COURT: Not the—not the Dodge.

MR. KORAN: No.

THE COURT: All right, continue. As I reviewed this file, I needed that information. It's not in the plan. It doesn't refer to the automobile. Go ahead.

MR. KORAN: So based on that proposition that we do have to add an interest rate to compensate for the changing value of the dollar, since this $4,225 is worth more today than it will when SCS finally receives it, we have to add an interest rate, and we acknowledge that, and we are. But that doesn't mean there should be a 21 per cent interest rate that adds substantial profit and other transaction costs that just aren't here. Collection costs are eliminated. Marketing is eliminated. And as the Trustee stated before, if they don't like it they could file an objection. They still have their collateral until their claim is paid off. They're not losing any rights, and if the case is dismissed, they retain all their rights back.

We feel that nine and a half per cent is more than adequate to compensate the creditor for the present value. In computating this interest rate we used the method in *IN RE: Carson*. We looked at the interest rate at the time of filing [19] which is approximately eight per cent. We added one and a half per cent for risk, and that's where we got the nine and a half per cent for interest, and we feel that more than compensates the creditor for their claim.

THE COURT: All right, sir. Lawyers, I have a—I have a brief that has been filed in this matter by Mr. Kohan. Mr. Smith, I am aware of the fact that you filed a brief in an earlier case that we had that was then dismissed when we thought this issue would get resolved. Would you like the opportunity to file a brief in this case?

MR. SMITH: Yes, Your Honor. That—

THE COURT: How much time would you need, sir?

MR. SMITH: Probably—I could have—I should be able to have it within ten days, I would think.

THE COURT: All right. That would be fine. If there's something—if there's something in that brief that has happened somewhere in the Seventh Circuit or in one of the

other Circuits of a very unusual nature on this point, Mr. Kohan, and you want to respond to—you just give us a call and bring that to our attention, and we'll give you time to do it. Now if it's not you ve already had you already have your brief on file. Only if something has happened right on point recently—

MR. SMITH: Sure. And, Your Honor, if I could add, it may be—I'm sure everyone wants to speed this up and get [20] this issue resolved. I don't know. I'm not a big trial lawyer. I don't know how appropriate this is, but the brief that I submitted in that other case would be basically the brief that I would submit in this case, so I don't know if you as a Judge can take judicial notice of that brief and review that and thereby speed this process up if no one has any objections.

MR. KOHAN or MR. BROTHERS: I wouldn't object to that.

THE COURT: Well, I—

UNIDENTIFIED FEMALE: It wouldn't be a part of the record (unclear)

THE COURT: Yeah, it wouldn't be part of the record.

MR. SMITH: Okay. That's what I wondered. Like I said, I'm not a trial lawyer so I don't know the technicalities, but I will try to get that brief submitted as quickly as possible. I probably could do it—

THE COURT: I think it would be cleaner if we did that.

MR. SMITH: Okay.

THE COURT: now—all right, now having dealt with that aspect of this case, I have another aspect of it that I touched on earlier and we've got to address, and that is that everybody wants an answer on this, and I anticipate this case going up, but that means that we're going to have a brief [21] period of

time or some period of time while it goes through the appellate process. We have this case, the Till case, and we have these other cases where counsel has remained in the courtroom.

I would like to do this: When I make my decision on this matter, that while it will not be final because of the appellate process, I would like it to be an interim final issue so that the Trustee can get payments of all of these cases that have this issue and make distributions so we do not have a backlog of funds with the Trustee and creditors sitting out there waiting. for this issue to be decided.

Gentlemen, do you have a problem with that?

MR. SMITH: No, Your Honor. If I understand correctly, I would—my client would still file its objections, but you could move forward with the confirmation process otherwise, while we're waiting for a decision, is that correct?

THE COURT: Right. That's right. But when you say—they might not want to file an objection either.

MR. SMITH: Yeah.

THE COURT: Depending on what I do, you see.

MR. SMITH: Sure. Exactly. Right. Exactly. I understand.

THE COURT: Because there are two sides to this issue, and I'll take a hard look at it and try to come up with [22] something that gives us some order and some certainty, because one of the ways that Chapter 13s work, just to move them through very rapidly and to get a stream of payments going to creditors through our Trustee, Mr. Brothers, so that's where we are. You get your brief in in ten days, and, yes, Mr. Kohan, you're standing.

MR. KOHAN: Your Honor, I would just like to call Professor Russell. He's a Professor of Economics at IUPUI, and I think he may be able to help the Court.

THE COURT: Oh, I didn't realize that you had a—that you had a witness on this matter.

MR. KOHAN: Yes, Your Honor.

THE COURT: All right, you're here to enlighten us on this, Mr. Russell? Professor?

PROF. RUSSELL: Yes, Your Honor.

THE COURT: Come forward, sir. Let's hear what you have to say.

PROFESSOR STEVE RUSSELL, DEBTORS' WITNESS, DULY SWORN

THE COURT: All right, have a seat.

MR. BROTHERS: Judge, might I be excused in about ten minutes? I have matters down the hall.

THE COURT: Do you have any questions of the Professor?

MR. BROTHERS: No, I do not. I wanted to take in part of it, but then I do have to leave for other hearings.

[23] THE COURT: Well, you feel free when you want to, Mr. Brothers. Counsel may examine.

MR. KOHAN: Thank you.

DIRECT EXAMINATION

BY MR . KOHAN:

Q. Please state your name for the Court.
A. Steve Russell.
Q. And where are you employed?
A. I'm the Professor of Economics at IUPUI.
Q. Would you go through your employment history a little bit?

A. Yeah, I've had a—got a Ph.D. from the University of Minnesota. I taught at the University of Georgia for four years. I worked as an economist in the research department of the Federal Reserve Bank of St. Louis for three years, and I've been at IUPUI for six or seven years.

Q. What are you currently teaching?

A. The course that I teach the most frequently is Money and Banking.

Q. Okay. Thank you. Let me ask you this generally, what's the purpose of the prime rate? Why do banks and other lending institutions use that as a benchmark in computing interest rates, or starting at least off on interest rates?

A. Well, the prime rate is a rate that banks charge on loans to their most credit-worthy corporate customers, and it's part of a uniform national market, so it's a uniform rate across the [24] country. So it's easy to point out, you know, the rate on this particular class alone is going to be the same in California as in New York or anywhere else in the country, so it's a benchmark, a national benchmark rate.

Q. Okay. Does that generally take into account the change in the value of the dollar? Or maybe if you want to get into what this whole concept of the changing value of the dollar?

A. Yeah, there's three or four things in the prime rate that are also in any other market interest rate of varying degrees. There's an adjustment for the change in the purchasing power of the dollar, or the inflation rate. Right now that's probably two and a half per cent or so. There is an adjustment for the fact that something you referred to that people prefer dollars now to dollars later, and so a dollar now is a little more valuable than a dollar later, even if there is no risk that the dollar won't be repaid. And that—that number right now is probably roughly three and a half per cent. That's the difference between the inflation rate and the interest rate on a very safe loan to the federal government, a Treasury bond, okay?

So that would take us up to roughly six per cent, which was the Treasury rate on comparable loans, I think, at the time of this bankruptcy filing. The prime rate was, at the time was closer to eight per cent, and that two per cent is mostly, I think, risk to some extent transactions costs. There [25] is some risk on these loans, even though they're to pretty credit-worthy firms, because in most cases they're not secured, which makes them different from, say, a car loan.

Q. Mmhmm.

A. There's no explicit collateral on most of these loans.

Q. So generally, the loans that are secured, let's say you said car loans are—have lower interest rates than unsecured, let's just say credit card loans?

A. Right. What matters is what the lender is likely to get in the event of a default, and obviously he's likely to get much more on a secured loan than on an unsecured loan. On an unsecured loan it's possible to get nothing, and often happens.

Q. So they get some of the collateral and at least get some of their costs back.

A. Right.

Q. Okay. What, in your opinion, generally speaking, what are some of the facts—other factors that go into interest rate? You could look at prime rate, but obviously not if you want to use it as prime rate. What else is it—what else—what's the main factor that goes into—

A. Yeah, if you look at interest rates on loans, you know, that have rates above the prime interest rate, which most loans do, probably the single biggest determinant of the interest rate is the risk on the loan over and above the risk on one of these loans to a corporation that presumably is a very good [26] credit risk. There is also an adjustment for the transactions costs of making a loan, which can include things like legal costs. I could include overhead for providing the facilities to have people come in and borrow, so there is a

variety of different costs involved in making loans, and those are different, for different classes of loans, and so higher for some, lower for others.

Q. Let me ask you this: Based on what you've heard and what's been presented, would you feel that a nine and a half per cent interest rate is a reasonable interest rate for this—for an auto creditor, given the present value of their claim?

A. Yeah, I guess—I would think that nine and a half was plenty. I looked at the interest rate, the current average interest rate in the United States on new car loans. Now this is a used car loan, so you might want to add a little bit to that rate, but it was roughly eight and a half per cent, so actually interest rates on car loans are pretty low. Again, the—close to the prime rate because the security provided by the car kind of offsets the fact that these are loans to very credit-worthy firms.

Q. Mmhmm.

A. So the additional one and a half per cent, you know, in the prime plus one and a half, I guess you could interpret as an adjustment for the fact that the transactions costs of [27] making small loans to people to buy cars are higher than the costs of making big loans to General Motors or whatever. And so it seems like a very reasonable rate. So with the understanding that the risk on making the loan is fairly limited because the borrowers are under the supervision of the court and are working with a plan that's supposed to be financially feasible, et cetera, et cetera.

MR. KOHAN: Okay. Thank you very much. I'm done, Your Honor.

THE COURT: Mr. Smith, cross-examination, sir.

MR. SMITH: Thank you, Your Honor.

CROSS-EXAMINATION

BY MR. SMITH:

Q. Sir, have you ever worked for a creditor?

A. I actually have worked for a commercial bank briefly, before I went to graduate school

Q. And when was that?

A. That was when I was an undergraduate—would have been in the late 1970s, early 1980s.

Q. Okay, are you familiar with the particular credit criteria that any individual banks use in determining when to make a loan to particular customers or applicants?

A. Well, not in any degree of detail. I mean, I know the factors that are involved, but I wouldn't know how any particular creditor would assess those factors.

[28] Q. Okay. Are you familiar with the non-prime auto market, auto lending market?

A. Yeah, I know what you mean when you say "non-prime market."

Q. And how would you characterize that?

A. Again, I think it's just loans that are viewed by the lenders as sort of singularly risky or much more risky than loans that are extended at the prime rate.

Q. And do they typically have substantially higher rates, or do you know the rates that non-prime lenders typically set in this locale?

A. Yeah. I guess I wasn't familiar with the non-prime rates on auto loans. I would think that 21 per cent or something close to it might be a representative rate on an unsecured loan.

Q. But you're not—but you're not familiar—

A. But, no, I'm not actually familiar—

Q. —actually with the non-prime rates—

A. —that's correct.

Q. —for the auto market.

A. That is correct.

Q. Okay. Are you familiar with the default rates in the non prime market typically?

A. No, I'm not.

Q. And are you familiar with the costs of collection that the [29] typical non-prime lender has in collecting on these loans?

A. Again, not in any detail.

Q. Have you seen the credit report of the debtors?

A. No.

MR. SMITH: No further questions.

THE COURT: Any redirect?

MR. KOHAN: No, Your Honor.

THE COURT: Any questions, Mr. Brothers?

MR. BROTHERS: No, Judge, thank you.

THE COURT: You may step down. Thank you very much for coming. Do you have any further witnesses?

MR. KOHAN: No, Your Honor.

THE COURT: Mr. Smith, do you have any witnesses?

MR. SMITH: Yes, Your Honor. I have two witnesses and I'll try to get through those as quickly as we can. I would like to call Craig Cook to the stand, please.

THE COURT: All right.

CRAIG COOK, WITNESS FOR THE LENDER,
DULY SWORN

THE COURT: All right, please have a seat and state your name for the record.

THE WITNESS: Craig Cook.

THE COURT: Counsel may examine.

MR. SMITH: Thank you, Your Honor.

DIRECT EXAMINATION

BY MR. SMITH:

[30] Q. Mr. Cook, would you give your address, please?

A. 1242 East 90th Street, Indianapolis.

Q. And who do you work for?

A. Instant-Auto Finance.

Q. And is Instant-Auto Finance the originating credit seller in this particular transaction that we're here discussing today?

A. Yes.

Q. Instant-Auto Finance, did they sell the car on a retail installment contract basis?

A. Yes.

Q. And was that contract then subsequently assigned to a finance company?

A. Yes, it was.

Q. And which finance company was that?

A. SCS Credit Corp.

Q. Okay. And is it typical for Instant-Auto Finance to assign the retail installment contracts that it generates in the course of its business to SCS Credit Corp.?

A. Yes, it is.

Q. In fact, and they assign all those contracts to—

A. Yes.

Q. —to SCS Credit Corp.? How long have you worked for Instant-Auto Finance?

A. Thirteen years.

[31] Q. And how long have you worked here at the Indianapolis location?

A. Three years.

Q. Is that the entire time that this location has been opened and—

A. Yes.

Q. —operating?

A. Yes.

Q. What's your job title?

A. Sales manager.

Q. Do you decide whether Instant-Auto Finance will sell a vehicle to a potential customer on credit?

A. Yes, I do.

Q. What are the factors that you consider when making this credit decision?

A. Job time, time at their present address, their credit report, the amount of money that they have to put down on the vehicle.

Q. Okay. Do you ever consider references?

A. Yeah. Yeah.

Q. Okay. What is your industry referred to with respect to the type of customers to whom Instant-Auto Finance typically sells?

A. Sub-prime or non-prime.

Q. Why is it called that?

[32] A. Because the typical customers that we sell cars to have poor credit histories and are risky customers.

Q. Are you familiar with the credit history of the debtors and other relevant characteristics?

A. Yes.

Q. Is the credit history and the credit characteristics of Y the debtors similar or typical of the types of customers that Instant-Auto Finance typically sells to?

A. Yes.

Q. What was the rate of interest that Instant-Auto Finance charged the debtors when this vehicle was sold?

A. 21 per cent.

Q. What is the rate of interest typically charged by Instant Auto Finance?

A. 21 per cent.

Q. Does Instant-Auto Finance ever sell vehicles on credit other than to employees for a rate of interest of less than 21 per cent?

A. No.

Q. Based on your job experience in the industry are you aware of the interest rate charged by other similar lenders in this area?

A. Yes.

Q. And what is—what is that rate of interest?

A. 21 per cent.

[33] Q. How does Instant-Auto Finance view a credit applicant who appears to be a candidate for a Chapter 13 bankruptcy petition?

A. Negatively.

Q. Are you aware of how other lenders similar to Instant-Auto Finance view credit applicants who appears to be candidates for Chapter 13 bankruptcy?

A. Negative as well.

Q. And would your answer be the same if I were to ask you how Instant-Auto Finance or other similar lenders view applicants—credit applicants who are actually in a Chapter 13 proceeding?

A. Yes.

MR. SMITH: I have no further questions, Your Honor.

THE COURT: Cross-examination of this witness?

CROSS-EXAMINATION

BY MR. KOHAN:

Q. You decide whether or not to give credit to particular negative particular people, right?

A. Right.

Q. Do you actually decide on an interest rate? I mean I understand it's always 21 per cent. Is that something that you made the call, or does someone else make that call at 21 percent?

A. Someone else makes that call.

Q. So is it set by someone higher up in the company? Is that [34] it?

A. Yes.

Q. So you really—you don't know where they come up with that 21 per cent. It's just something they told you you charge people with bad credit.

A. I believe it's what the market will bear.

Q. Well—but I mean you don't know how they determined that 21 per cent interest, is that correct?

A. Correct.

Q. Okay. You may have heard these arguments, a lot of references to present value. Do you understand what present value means in the bankruptcy sense or the economic sense?

A. No.

MR. KOHAN: Okay. Thank you.

MR. SMITH: No further questions, Your Honor.

THE COURT: You may step down, sir. Any further witnesses?

MR. SMITH: Yes. One more, Your Honor. Neil Bird.

NEIL BIRD, LENDER'S WITNESS, DULY SWORN

THE COURT: All right, sir. Please have a seat, state your name for the record.

THE WITNESS: My name is Neil Bird.

THE COURT: Counsel may examine.

MR. SMITH: Thank you, Your Honor.

DIRECT EXAMINATION

[35] BY MR. SMITH:

Q. What's your address, Mr. Bird?

A. 1722 Bader Avenue, South Bend, Indiana.

Q. And where are you currently employed?

A. SCS Credit Corp.

Q. And how long have you been employed there?

A. Four years.

Q. And what is your job title or your position there?

A. I'm the general manager of SOS.

Q. Does that involve overseeing collections of accounts?

A. Yes, it does.

Q. Where did you work before you were employed by SOS Credit Corp.?

A. Teachers' Credit Union.

Q. How long did you work there?

A. Nine years.

Q. You've heard some of the testimony-today about prime and non-prime lending markets. How would you characterize SOS Credit Corp.?

A. We're a non-prime lender.

Q. How would you characterize Teachers' Credit Union, your employer of nine years before coming to work for SOS Credit Corp.?

A. They were a prime lender.

Q. Does SCS take assignment of retail installment contracts [36] from Instant-Auto Finance?

A. Yes, we do.

Q. And is that what happened in this particular case with the debtors—

A. Yes.

Q. —and the contract that they signed?

A. Yes, it is.

Q. Are you familiar with the credit history and the credit characteristics of the debtor?

A. Yes.

Q. Are the credit history and credit characteristics of the debtors similar to other customers that SCS Credit Corp. takes assignment of—

A. Yes, is it.

Q. —on a retail installment contract basis?

A. Yes.

Q. What is the rate of interest on the retail installment contract that SCS takes assignment of?

A. Twenty-one per cent.

Q. Is that always the case with non-employers? Are there ever any exceptions made?

A. No, there's not.

Q. And what is the rate of interest that the debtors agreed to on this particular retail installment contract?

A. Twenty-one per cent.

[37] Q. How does SCS Credit Corp. view Chapter 13 bankruptcy petitions?

A. We do not like them.

Q. Why not?

A. Because usually we don't get paid the full plan for the vehicle.

Q. Okay. Is there any delay in receiving the money?

A. Yes, there is.

Q. Do—do Chapter 13 debtors ever enter into a plan and then SCS Credit Corp. actually never receives any distributions under the plan for one reason or another?

A. Yes that's correct.

Q. Do you know how other non-prime lenders view Chapter 13 bankruptcy petitions, both with respect to potential applicants or customers that they already have on their books when a Chapter 13 petition is filed?

A. They're the same as SCS. They do not like them.

MR. SMITH: Okay. I have no further questions.

THE COURT: Cross.

CROSS-EXAMINATION

BY MR. KOHAN

Q. Do you con—do you set interest rates for SOS? Do you—

A. No, I do not.

Q. —do you control that? So again, that comes from the higher-up in the company, I take it—

[37] A. Correct.

Q. —is that correct?

A. Mmhmm.

Q. Do you know why they picked 21 per cent? It was just because that could get—that's what could get away with in Indiana?

A. That's what the market would bear.

Q. Well, that's—but that's what they could get away with also. I mean, they can't go any higher than twenty-one per cent, is—do you know? I mean,—

A. No, I do not know that.

Q. But you—again, you don't know what goes into this 21 per cent. Do you know how much is for risk? How much is for profit, how much is for marketing, how much is for collections costs?

A. No, I do not.

Q. You don't know anything that goes into this at all—

A. No.

Q. —is that correct? And again, do you understand the meaning between present value and its meaning in the bankruptcy sense and—

A. Somewhat.

Q. Really—do you have a degree in economics?

A. No, I do not.

Q. Are you an actuary?

[39] A. No.

MR. KOHAN: Okay. Well, thank you very much.

THE WITNESS: Okay.

THE COURT: Redirect?

MR. SMITH: No questions, Your Honor.

THE COURT: Thank you, sir. You may step down. Anything further, lawyers?

MR. SMITH: No, Your Honor.

MR. KOHAN: No, Your Honor.

THE COURT: All right, we have a briefing schedule that we discussed earlier—

MR. KOHAN: Yes, Your Honor.

THE COURT: —and you are aware of that. Mr. and Mrs. Till—it is Mr. and Mrs. Till?

MR. TILL: Yes, Your Honor.

MRS. TILL: Yes, Your Honor.

THE COURT: I want to—the reason I say that is I note something on your schedules where it asks marital status and it says 'Not Married," and I—

MR . KOHAN : That's—that's a typo.

THE COURT: I have your names the same and two children, so I assumed that fact. You've been with Chrysler a year.

MR. TILL: Two, Your Honor.

THE COURT: Two years now. Your schedules said one [40] year, that's why I picked that up. You have an opportunity for a very good situation if you're responsible.

MR.TILL: Yes, Your Honor.

THE COURT: On the income on your schedules your income would be over $52,000 for one year. That's just with one person in this family being employed, and that's yourself. If you're very careful with your funds you can enjoy a certain amount of freedom, and I noted throughout the schedule that you have Rapid Pay and Fast Cash and Checks to Go.

MR. TILL: Yes, Your Honor.

THE COURT: I can't think of anything worse for a young couple to do than to get involved in those organizations.

We're talking here about a 21 per cent interest rate and have a fuss over whether that's market or not. When you consider the interest rates of Check-N-Go and Fast Cash and Rapid Pay, this 21 per cent pales. You're talking about three and four hundred per cent interest on that money when you use their services. Are you aware of that?

MR. TILL: I do now, si—I mean, after I had gotten myself into that trouble, I have, Your Honor.

THE COURT: Okay. You want to be very careful. There is no—there is no dignity that is finer and no independence better than living within one's means because when you do that, you are free. When you stop and consider the fact that every loan you make you indenture yourself to that [41] creditor, you become that creditor's employee with no benefits whatsoever. And the heavier the debt, the greater the indenture. Do you understand what I'm saying?

MR. TILL: Yes, Your Honor.

THE COURT: So you're going to have an opportunity to free yourself from this as the lawyers and the system works through this issue of the interest rate; but for you personally this is a couple that has an opportunity to enjoy real freedom if you live within your means.

All right, I have the—as I said, the briefing schedule, and I'll take it from there and I'll get an answer to you gentlemen.

MR. SMITH: Your Honor, am I correct in understanding that these other cases set for today are all continued?

THE COURT: We're going to put them on hold—

MR. SMITH: Okay.

THE COURT: We're going to continue them, but we're going to—if the Trustee has no issue with it, we're going to conditionally, if you will, approve the confirmation so we get a stream of payments during this interim.

MR. SMITH: Sure. Okay. Thank you, Your Honor.

THE COURT: Any questions?

MR. KOHAN: No, Your Honor.

THE COURT: Thank you.

[42] (End at Tape #1, Index #3303. 10:31 a.m.)

* * * * *

I certify that the foregoing is a true and accurate transcript from the electronically sound recorded record of the proceedings.

/s/ Gloria C. Irwin 7/29/00
GLORIA C. IRWIN Date
Certified Transcribes NJ A0C200
Federal CET #122

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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

IN RE:)
) CASE NO. 99- 1 3425-FJO-13
LEE MADISON TILL)
AMY HELEN TILL)
DEBTOR(S))

CONDITIONAL
CONFIRMATION ORDER

The debtor's plan (or amended plan) having been filed on January 19, 2000 and having been transmitted to creditors; and

The trustee, after having conducted a first meeting of creditors, has reported to the Court as follows:

1. That the plan complies with provisions of Chapter 13 and with other applicable provision of the Bankruptcy Code;

2. That the filing fee and any other amount required to be paid before confirmation has been paid;

3. That the plan has been proposed in good faith and not by any means forbidden by law;

4. That the value, as of the effective date of the plan, of the property to be distributed under the plan on account of each unsecured claim is not less than the amount that would be paid on such claim if the estate of the debtor were liquidated under Chapter 7 on such date;

5. That each holder of an allowed secured claim provided for the plan has accepted the plan, or the debtor has surrendered the property securing such claim to such holder; or the plan provides that the holder of each secured claim retain the lien securing said claim and the

amount to be distributed under the plan on account of such claim is not less than the allowed amount of such claim;

6. That the debtor will be able to make all payments under the plan and to comply with the plan;

7. That is the trustee or the holder of an allowed unsecured claim previously objected to the confirmation of the plan, said objection was subsequently resolved or withdrawn.

And the trustee, having reported to the Court and having recommended confirmation of debtor's plan, the Court now adopts the trustee's report and, therefore,

ORDERS, ADJUDGES AND DECREES that the debtor's plan be, and the same is hereby confirmed; and it is

FURTHER ORDERED that the trustee shall charge such percentage fee as may be periodically be fixed by the Attorney General pursuant to 26 U.S.C. §586(E) and it is

FURTHER ORDERED that the debtor shall pay Robert

A. Brothers, Trustee: 740.00 per month for 36 months ($26,640.00) starting 11-25-99. Further, and per Court order 2-29-00, the debtor shall turn over copies of tax returns, and one-half (`/z) of federal tax refunds over $500.00 starting 4-30-00. Further, and per a hearing on 2-2900, the debtors are to file an amended schedules "I" and "J" after the outside the plan payments to Rent-A-Center are paid in full (this provision to permit the trustee to monitor the ongoing Best Efforts test). And finally, SOS Credit Corporation will be paid $4,000.00 + 9.5% interest thereon, and the case is conditionally confirmed at that amount. Should the creditor be successful in an appeal of the interest factor, the debtor shall immediately modify the plan to provide additional funding for the increased interest costs.

Date: July 13, 2000

/s/ Frank J. Otte
U.S. BANKRUPTCY JUDGE

DISTRIBUTION:

Debtor; Debtor's Attorney; U.S. Trustee; Chapter 13 Trustee
John Smith, 214 West Marion street, Elkhart, IN 46516

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

CASE NO. 00-4167

LEE M. TILL, AMY M. TILL,
Debtors,

LEE M. TILL, AMY M. TILL,
Debtor-Appellants,

v.

SCS CREDIT CORPORATION,
Creditor-Appellee.

PETITION FOR REHEARING EN BANC

The Honorable Kenneth F. Ripple
The Honorable Daniel A. Manion
The Honorable Ilana Diamond Rovner
Circuit Judges

Appeal From The United States District Court
For The Southern District of Indiana, Indianapolis Division
District Court Civil No.: IP00-1102-C-M/S
The Honorable Judge Larry J. McKinney, Chief Judge

UAW-DaimlerChrysler
Legal Services Plan
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CERTIFICATE OF INTEREST

The undersigned, counsel of record for Lee M. Till & Amy M. Till, Petitioners, furnish the following list in compliance with Fed. R. App. P. 26.1 and Circuit Rule 26.1(b):

1. The full name of every party or amicus the attorney represents in this case:

   ANSWER: Lee M. Till and Amy M. Till, Petitioners

2. If such party or amicus is a corporation:

   (i) its parent corporation, if any:

   (ii) a list of stockholders which are publicly held companies owing 10% or more of the stock in the party or amicus:

   ANSWER: N/A

3. The names of all law firms whose partners or associates have appeared for the party in the case or are expected to appear for the party in this court:

   ANSWER: UAW-DaimlerChrysler Legal Services Plan
   (a/k/a UAW-GM Legal Services Plan)
   220 South Norton Avenue
   Marion, IN 46952
   Telephone: (765) 662-8411, Ext. 225

DATED: September 3, 2002 By: _____
Rebecca J. Harper
Attorney for Petitioners

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I. STATEMENT IN SUPPORT OF EN BANC REVIEW

A. Uniformity of This Court's Decisions

The majority interprets "value, as of the effective date of the plan" at 11 U.S.C. § 1325(a)(5)(B)(ii) to require that the creditor receive the "indubitable equivalent" of its non-bankruptcy entitlement (presumptive contract rate) under a "coerced loan" theory.[1]

In *Matter of Burgess Wholesale Mfg. Opticians, Inc.*, 721 F.2d 1146 (7th Cir. 1983), this Court interpreted "value, as the effective date of the plan" at 11 U.S.C. § 1129(a)(9)(C) as strictly a "time value of money" concept to require that plan payments be discounted to "present value" as of the effective date of the plan. Although the Court in *Burgess* did not define the method for determining "present value," the *Burgess* decision has been cited as Seventh Circuit precedent distinguishing the concepts of statutory "present value" and "contractual" interest.[2]

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[1] It has been said that the "coerced loan" theory "profoundly misstates" the present value concept at § 1325(a)(5)(B)(ii). *In re Dingley*, 189 B.R. 264, 269 (Bankr. N.D.N.Y. 1995). The concept originated not in case law, but as an editor's comment in the Collier Bankruptcy treatise that "a deferred payment under a plan is like a coerced loan." 5 Collier on Bankruptcy, ¶ 1129.03, p. 1129-99, 15th ed. (1994). As described by the Court in *In re Computer Optics, Inc.*, 126 B.R. 664, 671 (Bankr. D.N.H. 1991),"without citing any . . . authority. . . , the Collier treatise took a 'quantum leap' from the present value concept (. . . time value of money) into a totally different concept of a loan transaction" involving a fact-specific inquiry that has "skewed the analysis ever since." Under the "coerced loan" theory, interest is viewed not as a "time value of money" concept, but as a creditor investment vehicle with profit as the bottom line.

[2] The Court's decision makes no attempt to distinguish the *Burgess* case, nor to reconcile its analysis with this Circuit precedent.

Because the majority's decision expands the statutory language far beyond the "present value" concept contemplated by this Court in *Burgess*—and because only the *Burgess* interpretation conforms to the statutory scheme—en banc review is required in order to secure and maintain uniformity of this Court's decisions.

B. Question of Exceptional Importance

The issue is the rate of interest to be applied under the Chapter 13 cramdown provision at 11 U.S.C. § 1325(a)(5)(B)(ii).

Adopting the "coerced loan method," the Court reasons that the creditor is entitled to the rate of interest it could have obtained had it foreclosed and reinvested the proceeds in loans of equivalent duration and risk. Slip Op. at 16-17. The Court concludes that the creditor's sub-prime contract rate—described by the dissent as an "eye-popping 21%" (Slip Op. at 19)—is presumptively correct (Slip Op. at 17).

The majority's interpretation of § 1325(a)(5)(B)(ii) places this Circuit in direct conflict with the decisions of the Second, Eighth and Ninth Circuit Courts of Appeal, all of which have adopted a "formula" method for computing the cramdown rate of interest. Slip Op. at 12. Under the "formula" method, the court adopts a risk-free market rate as a base and adds a risk premium corresponding to the court's determination of the riskiness of the reorganization plan.

The Eighth Circuit in *United States v. Doud*, 869 F. 2d 1144, 1146 (8th Cir. 1989), was the first of the Circuits to approve a bankruptcy court's use of a "formula" approach in determining Chapter 12 cramdown interest (treasury bond plus 2% risk premium). The Eighth Circuit also produced the most recent Circuit Court decision to adopt a "formula" approach in the case of *Household Auto Fin. v. Gorham*, 2001 U.S. App. LEXIS 26351, 22 Fed. Appx. 691, unpub. opin.

entered December 11, 2001 (Appendix "B") [Court approved bankruptcy court's use of treasury bond plus 2% risk premium pursuant to a local rule establishing the "Chapter 13 rate"]. The Ninth Circuit in *In re Fowler*, 903 F. 2d 694, 698 (9th Cir. 1990), concluded that the bankruptcy court had correctly adopted a "formula" approach (prime rate) for Chapter 12 cramdown, and remanded the case to the bankruptcy court for determination of an appropriate risk factor. The Second Circuit in *In re Valenti*, 105 F. 3d 55, 63 (2d Cir. 1997), ruled that Chapter 13 cramdown interest should be fixed at the treasury bond rate plus a 1-3% risk premium. The Court of Appeals in *Valenti* agreed with *Dingley*, *supra*, that "courts adopting the 'forced loan' approach misapprehend the 'present value' function of the interest rate."

The decision in the present case can be expected to have a profound impact on the jurisprudence of this Circuit. It is estimated that nearly 60% of U.S. adults have "sub prime" credit.[3] Most Chapter 13 cases are tightly budgeted, and reinstatement of the contractual interest rate will close the door to the most needy of debtors.[4]

The Chapter 13 cramdown provision at 11 U.S.C. § 1325(a)(5)(B)(ii) is first and foremost a provision permitting *modification* of the creditor's *contractual* rights. The majority decision turns the statute on its head by reinstating

[3] *See* "Sub Prime" Lending, 1998, 1999 New Media Auto Services, Inc., http://www.carinvoices.com/financing/about_financing/sub_prime_credit.htm.

[4] Payment of an allowed secured claim in an amount of $10,000.00 at 9.5% interest over the maximum five-year plan term requires base funding in an amount of $12,649.00 @ $207.00/month, whereas payment of $10,000.00 at 21% interest over the same period requires base funding of $16,356.00 @ $268.00/month—a staggering $3,707.00 increase in interest exclusive of the additional trustee fees generated thereon.

the creditor's state-law contractual rights preempted by the Bankruptcy Code.[5]

Because the statutory language at issue here appears in other sections of the Code where the statutory "time value of money" or "present value" method has been routinely employed, this decision raises imminent questions regarding the uniform application of numerous sections of the Bankruptcy Code, and can be expected to have far-reaching and unintended consequences.[6]

It is a fundamental purpose of Chapter 13 to provide debtors with an effective means of retaining property and dealing with secured creditors. H.R. Rep. No. 595, 95th Cong., 1st Sess. 124 (1977) *reprinted in* Vol. C, *Collier on Bankruptcy*, App. Pt. 4(d)(i) (Matthew Bender 15th ed. revised). The issue in this case has divided the federal judiciary across the country—as well as the panel in this case.[7] Few other issues under the Bankruptcy Code have produced so many opinions with such confusing and varied results. Despite the controversy surrounding this issue, few could disagree that financially-stressed debtors paying 21%

[5] Remarkably, if the creditor comes forward with persuasive evidence that its current rate is in excess of the contract rate, the creditor is entitled to *interest in excess of the pre-petition contract rate* under the majority's interpretation of § 1325(a)(5)(B)(ii). Slip Op. at 17, *citing GMAC v. Jones*, 999 F.2d 63, 70-71 (3d Cir. 1993).

[6] See, e.g., 11 U.S.C. § 1325(a)(4), 11 U.S.C. § 1325(b)(1)(A), 11 U.S.C. § 1225(a)(5)(B)(ii), 11 U.S.C. § 1129(a)(7)(A)(ii), 11 U.S.C. § 1129(a)(7)(B), all of which contain the same "value, as of the effective date of the plan" language.

[7] The Court acknowledges that this "issue has caused significant disagreement among the courts of appeals, bankruptcy courts and commentators." Slip Op. at 7 (citations omitted). Because of the divergency amongst the Circuits, it has been speculated that the U.S. Supreme Court will provide a conclusion to this debate, Robert Quila, Cramdown Interest Rate: Second Circuit Court of Appeals Addresses What It Is and What It Is Not," 6 *J. Bankr. L. & Prac.* 549, 558 (1997).

interest under a Chapter 13 plan are *not* effectively dealing with their secured creditors—as the legislature intended.

ARGUMENT

Summary of Legal Error

Petitioners contend that the Court's adoption of the "coerced loan" method introduces an "indubitable equivalence" standard that has no application to Chapter 13 cramdown. The Supreme Court has rejected judicial expansion of the "indubitable equivalence" standard where not expressly mandated by statute. 11 U.S.C. § 1325(a)(5)(B)(ii) contemplates a statutory "time value of money" calculation to be accomplished by means of a "formula" approach that has no reference to the underlying contract. The decision of the Court represents an improper judicial expansion of the statute at odds with the statutory scheme.

A. "Coerced Loan" or "Indubitable Equivalence" Method Violates Statutory Scheme

In *Matter of Aberegg*, 961 F.2d 1307, 1309 (7th Cir. 1992), this Court noted that the "basic legislative purpose" underlying Chapter 13 is to provide debtors a flexible means for repaying creditors.

Pursuant to 11 U.S.C. § 1322(b)(2), Chapter 13 debtors can modify the rights of secured creditors. The Supreme Court in *Nobleman v. American Savings Bank*, 508 U.S. 324, 329, 113 S. Ct. 2106, 2110, 124 L. Ed. 2d 228, 235 (1993) determined that the "rights" implicated by § 1322(b)(2) are *those rights provided by state law*. One such right identified by *Nobleman* is the *contractual interest rate*. Nobleman establishes that a creditor's state-law property rights are recognized in bankruptcy *only* in the absence of controlling federal law. Chapter 13 "cramdown" does not by definition require creditor consent. *In re Milham*, 141 F. 3d 420, 425 (2d Cir. 1998), *cert. den.*, 525 U.S. 872, 119 S. Ct. 169, 142

L. Ed 2d 138 (1998). By attempting to arrive at the appropriate interest rate in a vacuum—without any reference to the statutory framework of the cramdown provision—the majority reaches a result completely at odds with the statute. The "very essence" of § 1325(a)(5)(B)(ii) is *contract modification*. *In re Paschen*, 296 F.3d 1203 (11th Cir. 2002). Yet courts adopting the "coerced loan" method focus on the rate of interest the *creditor* would voluntarily accept. *GMAC v. Jones*, 999 F.2d 63, 68 (3rd Cir. 1993).

The "coerced loan" theory requires adjustment of the debtor-creditor relationship so as to make the terms of the "coerced loan" as close as possible to a tenable lending decision outside a bank context and to preserve the creditor's "market" rate of interest, i.e. profit. The plain language of § 1325(a)(5)(B)(ii) conveys no such intent. *In re Dingley*, 189 B.R. 264, 269 (Bankr. N.D.N.Y. 1995). As noted by the Court in *Dingley*, the "coerced loan" theory is based upon fictional premises. It is well-settled law that the 'Bankruptcy Code protects the creditor's interest in the *property*, not . . . the creditor's interest in the *profit* it had hoped to make on the loan.' *Id.* at 269, *citing In re Hudock*, 124 B.R. 532, 534 (Bankr. N.D.Il. 1991) (emphasis added). The Supreme Court has cautioned against an interpretation of a statute "more broadly than its language and the statutory scheme reasonably permit." *Touche Ross & Co. v. Redington*, 442 U.S. 560, 578, 99 S. Ct. 2479, 2490, 61 L.Ed 2d. 82, 97 (1979), *citing SEC v. Sloan*, 436 U.S. 103, 116 (1978). Bankruptcy codifications are to be interpreted so as not to create inconsistency with other Code provisions, and "pale presumptions" are to be avoided. *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 242-45, 109 S. Ct. 1025, 1031-32, 103 L.Ed. 2d 290, 299-300 (1989).

This Court has previously cautioned against invocation of broad purposes of legislation at the expense of specific statutory provisions. *Central States Southeast and Southwest*

Areas Pension Funds v. Belmont Trucking Co., Inc., 788 F.2d 428, 433-34 (7th Cir. 1986). Yet the majority sees as its ultimate task "to ascertain the policy decision made by Congress in enacting the statutory provision." Slip Op. at 8. The majority starts with the premise that it is "reasonable to presume" what Congress intended, Slip Op. at 9,[8] and that:

> [T]o exclude the element of profit from the fixing of the market rate would violate the *statutory directive* that the creditor be placed in the same position as the one in which it would have been if it had been allowed to end the relationship by repossessing the collateral.

Slip Op. at 16 (emphasis added).

There clearly is no such "statutory directive," and the result reached by the Court is certainly not mandated by the language of the statute. Where Congress has sought to provide holders of secured claims with their original "contract" rate of interest or a rate that reflects current fair "market value," it has employed language substantially different from the "present value" language employed at

[8] The Court begins with the fictitious *"presumption"* that Congress intended that the three alternatives for dealing with secured claimants at 11 U.S.C. § 1325(a)(5)(A), (B) and (C)—creditor consent, surrender of collateral or cramdown—must afford the creditor "equivalent protection." Slip Op. at 9. Yet under the express language of the statute, only one of these three requirements must be met. Where the creditor has accepted the plan under § 1325(a)(5)(A), the § 1325(a)(5)(B)(ii) requirement for payment of present value need not be satisfied. *In re Szostek*, 886 F.2d 1405, 1412-13 (3rd Cir. 1989). The three options are *not* to be combined. *Matter of Williams*, 168 F. 3d 845, 847 (5th Cir. 1999). The majority's initial premise that a debtor proceeding under the cramdown provision [§ 1325(a)(5)(B)(ii)] *"must put the creditor in a position reasonably equivalent to the position it would be in ... had it received and then sold the collateral"* [§ 1325(a)(5)(C)], Slip Op. at 9 (emphasis added) leads inevitably to the conclusion that the creditor must receive the "indubitable equivalence" of its bargain in order for the debtor to retain the collateral. Slip Op. at 14-16.

§ 1325(a)(5)(B)(ii). 11 U.S.C. § 506(b) requires payment of "interest on such claim . . . provided for under the agreement" (presumptive contract rate), and 11 U.S.C. § 362(d)(3)(B) requires payments in an amount equal to "interest at a current fair market rate on the value of the creditor's interest. . . ." The contrast between these Code sections is striking. It is a fundamental premise of statutory construction that "where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23, 104 S. Ct. 296, 300, 78 L.Ed. 2d 17 (1983).

The Court's analysis is also completely at odds with the statutory scheme. As noted by the Supreme Court in *United Sav. Assoc. of Texas v. Timbers of Inwood Forest Assocs., LTD*, 484 U.S. 365, 108 S.Ct. 626, 98 L.Ed.2d 740 (1988):

> A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme—because the same terminology is used elsewhere in a context that makes its meaning clear . . . or because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law. . . . That is the case here.

484 U.S. at 371, 108 S.Ct. at 630, 98 L.Ed.2d at 748 (citations omitted).

11 U.S.C. § 506(b) allows an oversecured creditor to add interest that accumulates prior to confirmation to the secured claimant awaiting distribution under the debtor's plan. The post-petition interest under § 506(b) becomes part of the secured claim and may accrue until the effective date of the plan. Upon confirmation, § 1325(a)(5)(B)(ii) requires that payments made under the plan return the "present value" of the § 506(b) secured claim amount to the creditor. In the case

of an oversecured creditor, § 506(b) and § 1325(a)(5)(B)(ii) compliment each other and together ensure the full payment of the value of the secured creditor's claim. *In re Harko*, 211 B.R. 116, 123 (2d Cir. BAP 1997), *aff'd*, 141 F.3d 420 (2d Cir. 1998), *cert. den.*, 525 U.S. 872, 119 S. Ct. 169, 142 L. Ed 2d 138 (1998) As a result of the reference to the "agreement under which such claim arose" at 11 U.S.C. § 506(b), the contract rate of interest is recognized as the presumptive rate of interest under § 506(b). *In re Harko*, *supra*, 211 B.R. at 119. The substitution of a contract rate of interest for "present value" interest under § 1325(a)(5)(B)(ii) ignores the different objectives underlying the selection of the interest rates under these two sections. In contrast, application of a strict "present value" approach is consistent with both the language of the statute and the clearly expressed intent of the legislative history.

In the context of Chapter 11 reorganization, both the House and the Senate recognized that "there may be situations in bankruptcy where giving a secured creditor an absolute right to his bargain may be impossible or seriously detrimental to the policy of bankruptcy law." S. Rep. No. 95-090, 95th Cong. 2d Sess. (1978); Report of Committee of Judiciary, H.R. 8200 No. 95-595, 95th Cong., 1st Sess. (1977). During the legislative process leading to the Bankruptcy Amendments and Federal Judgeship Act of 1984, Congress specifically considered an amendment requiring the contract rate of interest to be paid under § 1325(a)(5)(B)(ii) and rejected it. *In re Harko*, *supra*, 211 B.R. at 120, n. 7, *citing*, H.R. 1085, 98th Cong., 1st Sess. § 19(2)(A) (1983); H.R. 1169, 98th Cong., 1st Sess. § 19(2)(A) (1983); H.R. 4786, 97th Cong. § 19(2)(A) (1981). Under 11 U.S.C. § 1325(a), the court "shall" confirm the plan if certain minimal requirements for confirmation are met. A creditor thus cannot prevent confirmation by demanding greater protection than the statute affords.

The Court nevertheless concludes that the "old contract rate . . . serve[s] as a presumptive rate" under § 1325(a)(5)(B)(ii), Slip Op. at 17, thereby imposing a requirement under the statute that Congress itself rejected. It is impossible to believe that such a notable exception to the Code's overall scheme would not be unambiguously expressed, either in its text or legislative history. *Erlenbaugh v. United States*, 409 U.S. 239, 243, 34 L. Ed. 2d 446, 93 S. Ct. 477 (1972).

The Court's decision redistributes rights between debtors and creditors contrary to the statutory scheme. The majority adopts the holding of the Court in *GMAC v. Jones*, *supra*, 999 F.2d 63, wherein the Court stated as follows:

> [i]n the absence of a stipulation . . . , it would be appropriate for bankruptcy courts to accept a plan utilizing the contract rate if the creditor fails to come forward with persuasive evidence that its current rate is in excess of the contract rate. Conversely, using the same rebuttable presumption approach, if the debtor proposes a plan with a rate less that the contract rate, it would be appropriate for a *bankruptcy court to require the debtor to come forward with some evidence* that the creditor's current rate is less than the contract rate.

999 F.2d at 70-71 (emphasis added).

Under § 1325(a)(5)(A), the debtor need not satisfy § 1325(a)(5)(B) if the creditor fails to object to the plan. Requiring the debtor to "come forward with evidence" to support any below-contract interest rate renders § 1325(a)(5)(A) a nullity, and necessitates the setting of evidentiary hearings in the vast majority of Chapter 13 cases.

It is a well-recognized canon of construction that words repeated within the same statutory section have an identical meaning in the several places employed. *United States v. Nunez*, 573 F.2d 769, 771 (2d Cir. 1978), *cert denied* 436 U.S. 930, 56 L.Ed. 2d 774, 98 S. Ct. 2828 (1978). The

"value, as of the effective date of the plan" language at 11 U.S.C. § 1325(a)(5)(B)(ii) is precisely the same as language at § 1325(a)(4) and § 1325(b)(1)(A). This Court in *In re Rimgale*, 669 F. 2d 426, 430 (7th Cir. 1982) determined that § 1325(a)(4) requires payments to the creditor to be discounted to "present value." *Accord*, *In re Beguelin*, 220 B.R. 94, 99 (9th Cir. BAP 1998). In construing the same language at 11 U.S.C. § 1129 (a)(9)(C), this Court in *Matter of Burgess*, *supra*, 721 F 2d at 1147, also adopted a "present value" analysis to require that payments be adjusted "to allow for the changing value of a dollar." The Court in *In re Snider Farms*, 83 B.R. 977, 989 (Bank. N.D. Ind. 1988) construed *Burgess* as adopting the "time value of money" approach. *Accord*, *In re Martin*, 17 B.R. 924, 926 (D.N.D. Ill. 1982) [use of "present value" approach under § 1325(a)(4) is supported by weight of authority]; The Court in *In re Young*, 61 B.R. 150, 151-54 (Bankr. S.D. Ind. 1986) cited *Burgess* as Seventh Circuit precedent to distinguish statutory "present value" payments under § 1325(a)(4) and contractual interest under § 506(b). The *Burgess* narrow interpretation of the "present value" language coincides with the "formula method" proposed by Petitioners, in sharp contrast to the "coerced loan method" which focuses on the creditor's non-bankruptcy entitlement. Understandably, none of the courts adopting the "coerced loan" method make any attempt to reconcile the result with the remainder of the statute.

B. "Present Value," "Time Value of Money" and Formula Method" Inquiries Are Identical

It has been said that "present value" is not necessarily a legal concept, but rather a "term of art" used by the economic and financial communities. 1 *Blackstone's Commentaries* *59. "Present value" is the value today of a future stream of payments, discounted at the appropriate discount rate. "Present value" has been defined as the "time value of money," *In re Fisher*, 29 B.R. 542, 543 (Bankr. D. Ka. 1983),

and this definition was adopted by this Circuit in *Burgess*, *supra*, 721 F. 2d at 1147. The Court in the case of *In re Oaks Partners, LTD*, 135 B.R. 440, 445 (Bankr. N.D. Ga. 1991) noted that the "time value of money" approach is in fact *commonly referred to* as the "formula" approach.

Subsequent to many of the appellate interest-rate cases, the U.S. Supreme Court decided the case of *Associates Commercial Corp. v. Rash*, 520 U.S. 953, 957, 117 S.Ct. 1879, 1882, 138 L.Ed.2d 148,155 (1997), which noted that, under the cramdown option, the debtor is required to provide the creditor with payments that total the "present value of the collateral."

It is said that the obligation to pay "present value" interest on a bankruptcy claim is statutory, not contractual, and that the interest rate is not controlled by contract or market.[9] Proper application of statutory "present value" thus compels application of a formula that excludes profit or other contractual elements of the pre-petition loan.

As noted by a leading commentator, "creditor-based approaches to interest rates are nightmares of logic and application." Nothing in § 1325(a)(5)(B)(ii) suggests that "value, as of effective date of the plan" is a creditor-specific inquiry. Lundin, 2 *Chapter 13 Bankruptcy* § 112.1 at 112-8 (3d ed. 2000).

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[9] The Collier comment that "a deferred payment . . . under a plan is a *coerced loan* . . ." spawned a myriad of analyses attempting to discern the "market rate" for similar loans. This is a misnomer first, because there is no market for loans of this type, and second, because these are not in fact "loans," but "claims." A "loan" includes a contractual obligation to pay interest, whereas the obligation to pay interest on a "claim" is statutory, not contractual.

C. "Coerced Loan" Method Forces Payment of "Indubitable Equivalence" Contrary to Statute

The majority focuses not on the "present value" of the creditor's claim, but instead adopts language from *Koopmans*, *supra*, 102 F. 3d at 874, 875, requiring that the creditor receive the "indubitable equivalent" of its non-bankruptcy entitlement. Slip Op. at 14-16. The sole authority cited by *Koopmans* for interjecting an "indubitable equivalence" requirement in the Chapter 12 cramdown context was the pre-Code business reorganization case of *In re Murel Holding Corp.*, 75 F. 2d 941, 942 (2d Cir. 1935). The cramdown statutes at the center of the present dispute had not even been enacted when this "indubitable equivalence" standard originated.

"Indubitable equivalence" is a "term of art" that appears only twice in the Bankruptcy Code. Providing the "indubitable equivalent" of a secured creditor's collateral is one method of giving "adequate protection" under 11 U.S.C. § 361. The expression "indubitable equivalent" is also found at § 1129 (b)(2)(A)(iii), which allows the confirmation of Chapter 11 plans over the dissent of classes of secured creditors. *See* Lundin, 2 *Chapter 13 Bankruptcy*, § 112.1 at 112-20 (3d ed. 2000) ['indubitable equivalent' is a "term of art" at cramdown in Chapter 11 cases only]; Judge Lundin discounts the precedential value of *Koopmans*, noting that the case has afforded no predictability in interest rate decisions by bankruptcy courts within the Seventh Circuit].[10]

[10] Judge Rovner's comments regarding the *Koopmans* analysis are instructive, since Judge Rovner sat on the panel that decided Koopmans. Judge Rovner points out that, although the language in *Koopmans* endorses the "coerced loan" method, this Court in *Koopmans* in fact upheld the bankruptcy court's decision to use the prime rate with enhancement. The bankruptcy court in *Koopmans* was afforded discretion denied to the bankruptcy court in the present case. Judge Rovner suggests that, to the extent that *Koopmans* can be read to require any particular approach under

In contrast, for Chapter 13 secured creditor cramdown, Congress authorized one of the other alternative provisions allowed for Chapter 11 confirmation, *not* the "indubitable equivalent" provision. As noted by the Court in *In re Metz*, 67 B.R. 462, 467 (9th Cir. BAP 1986), *aff'd*, 820 F. 2d 1495 (9th Cir. 1987), since Congress could easily have used the "indubitable equivalent" standard of Chapter 11 for the parallel Chapter 13 cramdown and chose not to do so, the "indubitable equivalent" standard cannot properly be extended to Chapter 13 confirmation.

In originating the "indubitable equivalent" concept in *Murel Holding Co.*, *supra*, 75 F. 2d at 942, the Court determined that, in order for a business reorganization plan to provide a creditor *adequate protection,* the plan must provide a substitute of "indubitable equivalence" which must *both compensate for "present value" and "insure the safety of the principal."*

It is apparent that the "indubitable equivalence" standard enunciated by *Koopmans* and adopted by the majority affords significantly greater protection to the creditor than the simple "present value" calculation at § 1325(a)(5)(B)(ii), resulting in a creditor-specific inquiry into a particular creditor's contract and lost opportunity costs.

In the Chapter 12 context, the case of *In re American Mariner Industries*, 734 F. 2d 426 (9th Cir. 1984) was widely criticized for its holding that an undersecured creditor must receive the "indubitable equivalent" of its entire bargain under § 361(3), which was construed to include the present value of the creditor's state law rights to foreclose its collateral and reinvest the proceeds. *American Mariner* was

Chapter 12, the *Koopmans* analysis was not intended to control in cases involving sub-prime consumer loans, given the dramatic difference in interest rates and the serious adverse consequences to *consumer debtors* not addressed in *Koopmans*.

overruled by the Supreme Court in *Timbers*, *supra*, 484 U.S. 365, 108 S. Ct. 626, 98 L. Ed. 2d 740, where the Supreme Court held that adequate protection under § 362(d)(1) does not require post-petition payment of interest or lost opportunity costs to an undersecured creditor to compensate for the delay in a creditor's right to take immediate possession of the security and to reinvest the proceeds. The Fifth Circuit in *Timbers* noted that the "indubitable equivalent" standard sets "impossible guidelines" for adequate protection in reorganization proceedings and establishes a stringent standard inconsistent with reorganization concepts. *In re Timbers of Inwood Forest Associates, LTD*, 808 F. 2d 363, 365-68 (5th Cir. 1987). The Court noted the "disastrous impact" of the "indubitable equivalence" standard on the family farmer's reorganization prospects, and cautioned against extension of an "indubitable equivalence" standard beyond the strict confines of the statute.[11]

The Supreme Court in *Timbers* expressly rejected extension of the "indubitable equivalence" standard in the context of "adequate protection" to undersecured creditors under 11 U.S.C. § 362(d)(1). According to the Supreme Court in *Timbers*:

> The crux of the present dispute is that petitioner asserts . . . that the phrase 'interest in property' also includes the secured party's right (suspended by the stay) to take immediate possession of the defaulted security, and apply it in payment of the debt.

484 U.S. at 370-71, 108 S. Ct. at 630, 98 L.Ed. 2d at 748.

[11] Critics of the "coerced loan" method caution that the secured creditor could present expert testimony that no lender would make a loan which is compatible to the creditor's treatment under the proposed plan, only to propose an extreme rate of interest that a lender would require if it were to make such a loan. *See In re Village Associates*, 161 B.R. 127 (Bankr. E.D. Pa. 1993), aff'd, 181 B.R. 795 (D.E.D. Pa. 1995). Under such scenarios, the cramdown provision is rendered a nullity.

The Supreme Court in *Timbers* concluded that, in order for an undersecured creditor to be entitled to compensate for the delay in the creditor's right to take immediate possession of the collateral and to reinvest the proceeds,[12] the adequate protection provision at § 361(3) would need to expressly provide the creditor "such other relief... as will give such entity, *as of the date of the relief*, the indubitable equivalent of such entity's interest in such property." *Id.*[13]

Given the statutory clarity that the Supreme Court in *Timbers* would have required for according "indubitable equivalence" to an undersecured creditor in the context of adequate protection, one can only conclude that the Supreme Court would find no statutory basis to require payment of "indubitable equivalence" under § 1325(a)(5)(B)(ii).[14]

[12] Creditor in the present case similarly demands compensation for the "lost opportunity" to take immediate possession of the security and to reinvest the proceeds.

[13] The significance of the Supreme Court's decision to deny indubitable equivalence payments is heightened by the fact that, unlike the cramdown statute in the present case, the statute at issue in *Timbers* actually included "indubitable equivalent" language that the Court did not deem sufficiently specific.

[14] It is difficult to reconcile the result in *Timbers* with the Court's conclusion that the creditor is entitled to a rate of interest which will place it in as good a position as if it had been allowed to immediately repossess and reinvest the proceeds, Slip Op. at 14-16, because the cramdown statute contains no such requirement. The primary cases upon which the majority relies, e.g., *Koopmans*, *supra*, 102 F.3d at 874-75, and *GMAC v. Jones*, *supra* 999 F.2d at 66-71, similarly fail to conform with the *Timbers* result. The Timbers case has been viewed as significant in the cramdown context since adequate protection was determined not to encompass prevention of the creditor's lost opportunity costs. The concepts of "present value" and "adequate protection" are considered analogous, since both serve to protect the *status quo and nothing more*. *In re Collins*, 167 B.R. 842, 845-46 (Bankr.E.D.Tx. 1994).

III. CONCLUSION AND PRAYER FOR RELIEF

As evidenced by the 10-page dissent, the Court's decision is highly controversial and inexplicably at odds with the rehabilitative purpose of Chapter 13. The secured creditor is preferred at the expense of the debtor and other unsecured creditors in a federal system of bankruptcy intended to equitably apportion a debtor's limited assets. The decision has devastating consequences for Chapter 13 debtors like the debtors in the present case, who have struggled to maintain plan payments on a tight budget; it impedes the uniform application of "present value" concepts throughout the Code, and calls into question the continued viability of Chapter 13 cramdown—the very device that Congress provided debtors as a means to modify secured creditors' contractual rights and retain collateral essential to an effective reorganization.

En banc courts have the unique opportunity to determine the "major doctrinal trends" for their respective circuits. In the present case, en banc review will enable the Court to rectify an improper judicial expansion of the "indubitable equivalence" standard to Chapter 13 cramdown, and to return the cramdown interest analysis to the "present value" concept contemplated by the statute. Such action may thwart the needless confusion and litigation that will inevitably result in courts throughout this Circuit faced with the formidable task of applying the decision in its present form. Petitioners respectfully request that the Court reconsider its decision,

grant this petition for rehearing en banc, restore this case to the calendar for reargument or resubmission, or grant such other relief deemed appropriate by the Court.

Respectfully submitted,

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PROOF OF SERVICE

The undersigned hereby certifies that two copies of the foregoing Petition for Rehearing En Banc with attached Appendix, were served to the following: John M. Smith, 214 West Marion Street, Elkhart, IN 46516, together with a copy of the digital media (disk), and that one copy of the Petition for Rehearing En Banc with attached Appendix was served to each of the following: Robert Brothers, Trustee, 151 North Delaware Street, Suite 1400, Indianapolis, IN 46204; and the office of the U.S. Trustee, 101 West Ohio Street, Suite 1000, Indianapolis, IN 46204, by U.S. First Class Mail, postage prepaid, this 3rd day of September, 2002.

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